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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DURA CORPORATION AND KIDDE, INC.,
Petitioners,

-VS.-

TWM MANUFACTURING COMPANY, INC., and TURNER QUICK-LIFT CORPORATION,
Respondents.

On Petition For A Writ Of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

"Dura's"[1] petition for a writ of certiorari should be denied for the following reasons:

I. The Two Questions Posed By Petitioner ("DURA") Have No Ultimate Affect Upon The Award Granted And Are Thus Meaningless Within The Context Of This Case

This case involves a patent accounting heavily dependent upon facts derived since 1966 from 14 years

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[1] Respondent adopts Petitioner's nomenclature of "TWM" as Respondent and "Dura" as Petitioner. Respondent also designates reference to Petitioner's Appendix as "Ap ___". Respondent's Appendix at the end of this Brief is the Turner patent in suit and certain other referenced documents from the trial exhibits or testimony, and is designated "RA ___" for Respondent's Appendix.

of willful infringement and 13 years of litigation. During this time, *two* Courts of Appeals have spoken on *three* separate occasions, the District Court has spoken *three* times, and a United States Magistrate once.

It appears reasonable for Respondent to assume, under such circumstances, that this Court in facing its immense burden of setting national priorities within the limited time available to it, would not wish to grant a petition based on questions having no affect upon the ultimate outcome of a case. Such is the situation here.

For each of the 2 issues raised by Dura's petition, there exists a separate and independent finding or reason for granting the award. The questions posed, therefore, have no ultimate bearing on the outcome of this case, regardless of how they are answered. The following analysis shows why this is true.

A. Question 1: The "Entire Market Value Rule" Did Not Alone Set The Damage Base

Question 1 raises the issue as to whether or not the Court of Appeals for the Federal Circuit overextended the "Entire Market Value Rule"[2] by including in the compensatory damage base the wheels and axle of the patented Turner "Wheeled Vehicle Suspension" (RA 1-13). Dura argues it was improper to do so because these two components are, individually, unpatented, staple articles of commerce.

Even if this question is resolved in Dura's favor, it will have no bearing on the outcome of this case[3].

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[2] Fed. Cir. Opinion, Ap. 8a-9a.

[3] The reasons why these two components of the invention are properly included, given more than 75 years of law announced

Dura's petition fails to bring out, and indeed does not contest, the separate ruling of the Federal Circuit which held:

> "Because Dura did not show how many, if any, of the patented devices were sold alone without wheels and axles, the special master could not have apportioned the infringing sales if such apportioning had been appropriate."
>
> [Ap. 9a]

This was because Dura had lost its accounting documents (despite an in-chambers directive by the District Court to maintain them) before accounting discovery could be obtained [Ap. 8a][4]. This rendered impossible the ability to ascertain the necessary factors for arriving at any reasonable degree of accuracy in the apportionment.

The Federal Circuit, in rendering this opinion, was merely echoing the Magistrate's finding of fact in her Opinion also denying Dura apportionment on this very ground:

> "The plaintiff argues that trying to calculate out the wheels and axles as sold with the Dura 1400 to establish a base for the percentage royalty is an accounting nightmare.

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by this Court as early as the late 1800's and followed by the Fed. Circuit and District Crt., as well as the misrepresentations of fact found in Dura's brief on this subject, will be addressed infra.

[4] The Federal Circuit took note of Dura's lost documents at Ap. 8a. The fact that Dura lost its relevant accounting documents was admitted to by Dura's record keepers in their depositions [RA 46-48].

> This Magistrate agrees. There are no records available from the defendant that establishes how each of the infringing units were sold. Price lists on the units, whether sold as 'kits', 'kits' with wheels and axles or how many were sold as 'kits' or 'kits' with wheels and axles are not contained in this record. . . . .To establish a figure based on the defendants' theory of apportionment would be mere conjecture [citation omitted]."[Ap. 76a]

This finding, of course, was explicitly in accord with this Court's directive in *Storey Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 250-51, 75 L.Ed. 544 (1931) that risk of uncertainty should be thrown on the wrongdoer. In *Milgo Electronic Corp.* v. *United Business Communications Inc.*, 623 F.2d 645 (10th Cir. 1980), cert. denied, 449 U.S. 1066, 101 S.Ct. 794, 66 L.Ed.2d 611 (1980), after citing *Storey Parchment*, supra, the l0th Circuit held:

> "The rule against requiring precision in proving the extent of lost profits once infringement is established is further softened when the inability to prove lost profits is due to the infringer's own failure to keep accurate or complete records. The consequences of such failure must rest on the infringer." [citing a 3rd Cir. and S.D.N.Y. case in support] (pg. 665)

There are not, and never have been since 1931, any conflicting appellate court decisions on this point. The Federal Circuit has, of course, followed it as well. [e.g. *Lam, Inc.* v. *Johns-Manville Corp.*, 718 F.2d

1056, 1065 (Fed. Cir., 1983) citing *Storey* and *Milgo*, supra.]

Dura argues in its petition that apportionment was possible, using numbers like 50% for the axle and wheel cost [pg. 4, without citation to the record] and "about 10-20%" for the percentage of kits sold [fn. 2]. All of this was properly rejected by the Magistrate as speculative [Id. 76a]. Dura had lost its invoices and its pricing documents [Id. fn. 4]. Without such documents, no one could ascertain how much Dura was charging for its wheels and axles (requiring a labor cost to assemble) when it sold a complete Model 1400. Dura's unsupported allegation that their cost was indisputably 50% of the price is utter speculation [Ap. 76a]. Without these lost documents, furthermore, no one could ascertain, to any reasonable degree of certainty, what percentage of the total sales (either in number of units or dollar volume) were made up of complete suspensions and what percentage were kits [Ap. 76a, Ap. 9a][5]. Dura's unsupported estimate of "about 10-20% kits" is therefore also based on speculation [Ap. 76a].

The impossibility of apportionment was properly found as a finding of fact and affirmed as such on appeal [Ap. 76a, affirmed Ap. 9a]. Thus, before Ques-

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[5] The assessed compensatory damage base was the total sales volume of the infringing Model 1400, i.e. $20,859,889 [Ap. 76a] which was accurately ascertainable from documents that had not been lost. [See RA 59-59a]. Not one single wheel or axle sold separately by Dura or even as a spare part for the infringing Model 1400 is included in this base figure. It includes only the money actually collected from the customer for each sale of only a Model 1400 (either when sold as a "kit" or as a complete Model 1400, i.e. with assembled wheels and axles).

tion 1 could have any bearing on the outcome of this case, this Court would first have to reverse its recent ruling in *Anderson* v. *City of Bessemer City, N. C.*, ___ U.S. ___, 105 S.Ct. 1504, 1512 (1985) and its similar remanding admonition to the Federal Circuit to adhere to the "clearly erroneous" standard in Rule 52(a) in *Dennison Mfg. Co.* v. *Panduit Corp.*, ___ U.S. ___, 106 S.Ct. 1578, 1579 (April 21, 1986) and decide *de novo* that apportionment could be accomplished (or decide *sua sponte* that the finding of fact was "clearly erroneous"). This Court would thereafter have to prescribe the methodology to do it, because none of the three lower tribunals said it could be done. In doing so, care would have to be used to avoid resolving the issue in favor of the wrongdoer (Dura), unless *Storey Parchment*, supra was also to be overruled. Such does not appear to Respondent to be a task associated with the normally reported priorities of this Court.

B. Question 2: Willful Infringement Is By Itself Reprehensible Behavior And Was The Law Of This Case Before The Federal Circuit Existed; Thus Whether Or Not The Federal Circuit Has "Liberalized" The Law Is Of No Relevance Here

Dura's second question is predicated upon two assumptions. First, Dura assumes that the Federal Circuit has liberalized the law of punitive damages to now erroneously hold that a finding of willful infringement can result in such damages being awarded, even though there is no accompanying finding of "bad faith". Second, Dura assumes that this "liberalization" was the cause of the punitive damage award in this case by the District Court.

Dura does not contest that an award of such damages is properly left to the sound discretion of the

District Court, and is to be reviewed by an appellate court on that basis [Ap. 11a-12a]. As to its first assumption, Dura fails to cite a single case in support of it, as noted by the Federal Circuit [Ap. 12a]. In fact, both assumptions are in error as a matter of fact and law.

Willful Infringement Is By Itself Reprehensible Behavior Requiring No Separate Finding of "Bad Faith"

Willful infringement has long been one of the fundamental reasons for enhancing the damages under 35 U.S.C. §284. See Justice Brennan's Opinion in *Aro Mfg. Co.* supra, S.Ct. at 1543. As Dura recognizes at page 12 of its petition by its approving citation of the Federal Circuit case of *State Industries, Inc.* v. *A. O. Smith Corp.*, 751 F.2d 1226, 1237 (Fed. Cir. 1985) quoting from *Stickle* v. *Heublein Inc.*, 716 F.2d 1550, 1565 (Fed. Cir., 1983), willful infringement means:

> ". . .that the infringer acted in disregard of the patent, that is, that the infringer had no reasonable basis for believing it had a right to do the acts."

Contrary to Dura's first assumption, no extra finding of "bad faith" is required here, and Dura agrees that this is the appropriate law (Pet. pg. 12). There has been, therefore, no "liberalization" of the law. This, furthermore, is precisely what Dura did and why it was found to be a willful infringer.

Dura has no new evidence to present in this regard. It was all before Judge Gilmore during the 1981 liability trial, including all of the opinions of its counsel rendered after Dura was presented with the Turner patent, and decided to continue to infringe anyway.

The opinions of its counsel, it should be pointed out, were that Dura *was* infringing and that Dura, despite extensive investigation, could find no anticipatory prior art that would invalidate the Turner patent [RA 27-28, 60-68]. One quote from a memo to an outside counsel by Dura's in-house patent counsel, Max Murphy, exemplifies this:

> "You will note that the claims of the Turner patent . . . may be fairly read on the Model 1400. I have done some searching but have been unable to come up with an anticipation of the Turner patent . . ." (RA 36)

Further searching proved fruitless even when litigation got underway. For example, Judge Gilmore found one principle piece of prior art relied upon to be "almost silly"; another not even prior art, and the third, merely representative of the problems synergistically overcome by the unique Turner invention [Ap. 34a-35a].

In short, and as the eminent patent scholar, Professor Kayton, testified to (based on all of these Dura documents) at both the liability trial [RA 27-28] and even more thoroughly at the accounting trial [RA 60-68], Dura knew it was infringing and never held any reasonable ground for believing the patent was invalid. It proceeded, in the face of this, to manufacture and sell its infringing Model 1400 suspension anyway. That is classic, willful infringement as found by the District Court as the law of this case, as used as a basis for advising enhancement by the Magistrate, and as defined by the Federal Circuit in *State Industries, Inc.*, supra in the quote approved of by Dura in its petition at pg. 12.

No separate finding of "bad faith", as erroneously argued without legal support by Dura (and as properly rejected by the Federal Circuit, Ap. 12a), is necessary because such wanton and willful misconduct is itself reprehensible behavior warranting punitive damages. *Aro*, supra ["willful *or* bad-faith infringement" at S.Ct. 1543]. Wanton or willful disregard for the rights of others is, and always has been, a fundamentally recognized basis for punitive damages in tort law, without any need for any further finding. See Prosser, *Law of Torts* 4th Edition (Handbook Series) 1971, Ch. 1§2 "Punitive Damages", p. 9-10.

"Bad Faith" And Other Misconduct Was Found

The District Court, in addition to willful infringement, had specifically found "misconduct" [Ap. 96a], and was affirmed on this by the Sixth Circuit [Ap. 54a]. That, too, is the law of this case. The Magistrate found the same way, using the words "willful infringement and other egregious behavior of the defendants" when advising enhancement [Ap. 84a].

Dura seizes upon the District Court's denial of attorneys' fees under a different section of the Patent Act, §285, to support its contention that there was no finding of bad faith. Reference to the District Court's finding shows just how blatantly erroneous Dura's argument is:

> " . . . I am not prepared to say that I can go so far as to say that there has been bad faith action, that Dura Corporation has acted in *such* bad faith as to authorize attorneys' fees . . ." [Ap. 96a]

The District Court went on to say:

> "This does not mean, however, that I cannot consider enhanced damages because as I read the law, the standard for enhanced damages up to treble damages [§284] is not as stringent a standard as the standard which is set forth for the granting of actual attorneys' fees [§285]." [Ap. 96a]

The District Court, as noted by its citation of a Sixth Circuit case [Ap. 96a], was following Sixth Circuit law then in existence at that time. To argue from this that the District Court found no bad faith (i.e. egregious misconduct) is wrong.

Judge Gilmore, in reviewing the Magistrate's Report, was presented with this same argument by Dura [Ap. 96a] before deciding the enhancement issue. Using the discretion allowed him by law as the trial judge in such matters, and without any guidelines from the Federal Circuit, he enhanced the damages, quoting from his earlier opinion holding willful infringement and "misconduct" [96a]. After soliciting comments at the hearing on how much to enhance the damages (transcript made available to the Federal Circuit, and noted on this point at Ap. 12a "Nor has Dura . . . "), the District Court advised how egregious it felt Dura's behavior was by trebling the damages, the maximum allowed by the law. The Federal Circuit merely affirmed using the appropriate standard for appellate review [Ap. 12a].

Dura's first assumption fails for the above reasons. Only standard "willful" tort law was used in enhancing the damages and, in this respect, there was even an additional finding of egregious misconduct as well.

Dura's Second Assumption Fails: There Is No Nexus Between Any "Liberalization" By The Federal Circuit And The District Court's Award Of Punitive Damages

At the oral hearing on December 2, 1985 before the Federal Circuit, Dura's counsel admitted that the finding of willful infringement was the law of the case [Ap. 11a]. Dura has never made any attempt before the Magistrate, Judge Gilmore, the Federal Circuit or in its brief to this Court, to overcome "the-law-of-the-case" doctrine by the required, appropriate showings. See *EEOC* v. *Intern. Longshoremen's Assoc.*, 623 F.2d 1054, 1058 (5th Cir., 1980); *Smith International Inc.* v. *Hughes Tool Co.*, 759 F.2d 1572 (Fed. Cir., 1985). It is, therefore, the law of this case that Dura is a willful infringer of the Turner patent.

Willful infringement was found by the District Court in its Opinion of *May 21, 1981* [Ap. 37a, see also 40a, 41a, 42a]. Dura chose not to appeal this finding of willful infringement to the Sixth Circuit when it took its appeal to that Court in 1981[6]. At this time, therefore, willful infringement became the law of the case and the Court of Appeals for the Federal Circuit *did not even exist.*

Dura assumes, as a fundamental predicate to the relevancy of Question No. 2, that the enhancement of the damages in this case was due to the Federal Circuit's "liberalized . . . standards for awarding punitive damages". This simply can not be. *In 1981,* Judge Gilmore specifically held that he was reserving

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[6] The Sixth Circuit took specific note of this in footnote 2 of its Opinion [Ap. 47a]. The Sixth Circuit had previously turned down Dura's Motion to Stay the Injunction, particularly noting at that time the holding of willful infringement.

the question of whether he would assess enhanced damages under 35 U.S.C. §284 (for the accounting phase due to his previous bifurcation order) [Ap. 41a]. The Federal Circuit did not even exist yet to influence him in this regard.

When the District Court did treble the damages[7], based in part upon the Magistrate's recommendation to enhance them [Ap. 84a], it specifically did so by quoting from and relying upon: (1) its *1981* decision finding "willful infringement" and "misconduct" by Dura; and (2) its affirmance thereof by the Sixth Circuit[8] [Ap. 96a]. Nowhere is there any evidence that the Federal Circuit had any influence on this award.

Question No. 2, then, poses a meaningless inquiry when taken in the context of this case. All that the Federal Circuit did was to apply the "law-of-the-case" doctrine and "abuse of discretion" rule [Ap. 4a, 11a, 12a], to the issue of enhanced damages that came before it. Dura does not contest that that is the appropriate standard upon review. The Federal Circuit thus engaged in nothing more than standard, fundamental appellate practice. Such certainly does not amount to "liberalization" on the part of the Federal Circuit. *Dennison Mfg.*, supra.

Even if this Court then were to decide that the Federal Circuit had in some way improperly "liberalized" the criteria in other cases for granting such

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[7] Dura questions only the act of enhancement. It does not contest the propriety of trebling rather than doubling.

[8] The Sixth Circuit affirmed the finding of "misconduct" (egregious behavior) regarding the plagiarism and copying. As stated supra, willful infringement was not appealed and was the law of the case by this time.

damages, it would not change the outcome in this case or have anything to do with it. In this case, the Federal Circuit imposed none of its own criteria at all.

Dura's "liberalization" argument, in this respect, cannot stand the light of scrutiny. Dura's petition at pg. 13 seeks to support this argument by saying that in the 13 cases of punitive damages handled by the Federal Circuit, it has only reversed in three (3). Dura does not analyze any of these cases to see if the Federal Circuit was wrong or "liberal" in any of its 10 affirmances. It merely relies on a *naked* statistic. Given the fact that the standard is indisputably one of "abuse of discretion", the reversal rate is reasonable on its face.

II. Question No. 2 Does Not Relate To This Case For The Further Reason That Dura Is A Willful Infringer And As To Such A Willful Tort-Feasor, There Can Be No Chilling Effect By Granting Punitive Damages

Dura predicates its Question No. 2 upon the assumption that the Federal Circuit's alleged liberalization of the standards for awarding punitive damages, is serving "to chill the incentive for those most able to challenge potentially invalid patents" [Pet. Q2 pg. i]. Dura does not address the salient reverse question, namely, whether the granting of a petition on this ground by a willful wrongdoer will only encourage further, delaying and protracted lawsuits, as Dura has caused here. The answer is that it will.

Assuming arguendo, however, that Dura's "chilling" argument is true, it is still of no relevance to this case. Dura is a *willful* infringer. Willful infringers

are not "chilled" because they had no reasonable grounds for believing the patent was invalid in the first place. Dura, according to the law of this case, wantonly and willfully disregarded its own knowledge that the Turner patent was valid and that Dura was infringing it, and proceeded, in the face of this, and in anticipation of the fact that it would make *more than double* the normally expected industry profit [Ap. 69a, 71a], to make millions of dollars from its infringement[9].

No matter how this Court were to view Dura's claims that the Federal Circuit's alleged liberalization had chilled the incentive to contest validity, and on this basis restrict the criteria for punitive damages accordingly, it would never restrict them so much as to void punitive damages in the case of a willful infringer who is never "chilled" because he knows the patent is valid.

Question No. 2, for this additional reason then, has no bearing on the outcome of this case.

III. Question No. 1 Is Not Relevant To This Case Because The Wheels And Axles Are A Part Of The Patented Invention

Question No. 1 poses *in the hypothetical* whether or not an "unpatented staple article" should be included with the "patented item" in calculating the

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[9] This was due to the brilliance of the Turner invention [Ap. 36a, 52a] which, despite its humble origins, was in 1964 an immediate commercial success [Ap. 52a]. Indeed, when Dura received Turner's patent application in 1965, its personnel evaluated it as an excellent idea (e.g. deposition of Probst [RA 49-58]). Dura never responded [Ap. 45a] to Turner. Instead it plagiarized his invention [Ap. 54a].

compensatory damage base. Dura argues it should not.

Dura's brief does not describe what, *in this case*, the hypothetical "patented item" is. Since the wheels and axles are a part of the "patented item", its Question No. 1, for yet another reason, is but a hollow inquiry.

Dura, furthermore, fails to bring to the attention of this Court that the Model 1400 is made up of numerous "unpatented staple articles", not just the wheels and axles. For example, the four airbags are commercial items manufactured by Firestone and/or Goodyear for almost half a century. The U-bolts can be bought over the counter in many hardware stores. The air lines, control, and guages used to manipulate the airbags are all unpatented, staple articles of commerce. The brakes and related parts are standard items [see RA 38-45]. In short, except for the hanger brackets and pontoon members which are fabricated from standard commercial steel plates, a large number of the parts are commercial items from outside suppliers.

In answers to accounting phase interrogatories, Dura asserted that the only novel feature in the Turner invention was the upside-down leaf spring. Dura stated under oath that the cost thereof should be the royalty base. This would have left TWM with about $30,000 in damages, based upon Dura's $20,000,000 in sales. While such a disingenuous argument was dropped by Dura's new counsel (not the present counsel) before the accounting trial, it is an indication of the trap Dura is setting in its question, and why Dura's brief carefully does not state what the "patented item" is.

If this Court were to hold that the wheels and axles must be apportioned out, the dominoes would fall and Dura would be back to arguing its meaningless nominal royalty base of a few thousand dollars because all other "unpatented staple" items would have to be apportioned out as well. The trap Dura sets should not be tripped. Its hypothetical question has nothing to do with the facts of this case. The wheels and axles are a part of the "patented item". This case is, therefore, an inappropriate forum for inquiring into the issue raised, should an inquiry even be deemed appropriate. This becomes even clearer when Dura's mischaracterization of the wheels and axles as items of "convenience" is corrected.

A. The Wheels And Axles Are Not Items Of "Convenience" But Are Integral Parts Of A Functional Suspension System

Dura's characterization of the sale of the axle and wheels of a Model 1400 suspension as a mere "convenience" to its customers is untrue and unsupported by any citation to the record. Dura's assembling of the wheels and axles with the rest of the Model 1400 suspension parts is no more a "convenience" than it is a "convenience" to go to a dentist instead of doing your own dental work.

The act of integrating the wheels and axles with the rest of the parts requires skilled welding, alignment, and other labor-intensive acts. [See RA 38-45, installation instructions and Dura literature.] This is why so many[10] of Dura's (and TWM's) customers, who

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[10] As stated supra, Dura's percentage of kits between 1967-1981 could not be ascertained due to its lost documents. But TWM knows from experience it was a large number.

are otherwise skilled truck builders, order a complete suspension with wheels and axles, rather than a "kit", even though they know Dura (or TWM) is making a profit on them. As shown by all relevant documents of record [e.g. RA 38-45], after Dura finished welding and assembling the wheels and axles with the rest of the parts, they all became an integral part of the infringing Model 1400 suspension, and a part of the unique patented Turner invention entitled "Wheeled Vehicle Suspension" [RA 1-13]. Dura was no more a "middle man" (Pet. pg. 4) as to these parts, than any other part of the unique combination of elements that make up the Turner invention.

It is also to be pointed out and it is an uncontested fact, that the assessed compensatory damage base does not include a single axle or wheel not first assembled by Dura into the suspension and sold as such [RA 59-59a]. There is no logical doubt, then, that these wheels and axles are a part of the "damage" caused by the infringement[11].

B. The Claims Of The Turner Patent Expressly Include The Wheels And Axles And Thus These Items Are A Part Of The "Patented Item"

The Turner patent is found at RA 1-13. It was not included in Dura's Appendix. Dura's brief, further-

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[11] It is here not contested by Dura that TWM proved (and the Magistrate so found [Ap. 79a]) that for each sale Dura made, TWM lost a sale. [Aff'd. Ap. 92]. Obviously, if the customer had bought a complete suspension from Dura, but for the infringement he would have done so from TWM. There is no longer, therefore, any dispute over the fact that Dura's infringement proximately caused TWM to lose the sale of each wheel and axle included in the $21,000,000 base in the lost profit years. This is the very essence of a "compensatory" damage.

more, fails to bring out the salient fact that the claims of the Turner patent expressly call for the wheels and axles as part of the invention. For example, claim 3 [RA 12 & 13] states:

> " 3. In a wheeled vehicle, the combination comprising first and *second axles* extending transversely of said vehicle and spaced from each other longitudinally thereof and each *mounting wheels* on opposite sides of said vehicle along which the latter may travel, means connecting said first axle to said vehicle whereby said first axle and the wheels mounted thereon provide a primary means of vehicle support, a pair of leaf springs extending longitudinally of said vehicle on opposite sides thereof, each leaf spring having its end portions secured to said vehicle and its intermediate portion secured to *said second axle* and said leaf springs being mounted to normally exert a force which elevates *said second axle* and which raises *the wheels mounted thereon* above the surface along which the vehicle travels, a pair of extensible-retractable pneumatic motors on opposite sides of said vehicle and connecting *said second axle* to the latter, and means for selectively applying pneumatic pressure to said motors and forcing *said second axle* downwardly against the force exerted by said springs thereby lowering *the wheels mounted on said second axle* to forceable engagement with said vehicle travel surface."

It is, of course, a matter of fundamental patent law, as continuously held by this Court, that the claims

of a patent define the "patented item". *Smith* v. *Snow*, 294 U.S. 1, 11, 55 S.Ct. 279, 283 (1935); *Continental Paper Bag* v. *Eastern Paper Bag*, 210 U.S. 405, 419, 28 S.Ct. 748, 751 (1908). See also *Graver Tank & Mfg. Co.* v. *Linde Air Products*, 339 U.S. 605, 607, 70 S.Ct. 854, 855 (1950).

There is no question, then, but that the "patented item" includes the "axle" and "the wheels mounted thereon" of the infringing Model 1400 suspension. Claim 3 recites the axle five times and the wheels three times. There is, therefore, no conflict whatsoever with the misuse doctrine. The wheels and axle are a part of the patented property right, statutorily (Patent Act) guaranteed exclusivity when, *and only when*, used *as a part of the patented combination.*

C. The District Court Determined The Scope Of The Patented Invention In 1981 To Be A Lift Axle Suspension Made Up Of A Synergistic Combination Of Parts

Dura has done an about-face from its position taken during the liability phase. At the liability trial, in an attempt to have the patent held invalid, Dura asserted that the claims covered too many elements and therefore recited something known as an "old combination". In rejecting this contention, the District Court held [starting at the bottom of Ap. 35a] that the recitation of the vehicle and primary axle merely established the "operative environment" for the "new suspension". The District Court particularly noted that the "unique suspension" functioned as a "lift *axle*". It took particular note of the title "*Wheeled* Vehicle Suspension". Nowhere did the District Court find that Turner had overclaimed because he had recited an

axle as his "lift axle" and wheels on the axle so that the "*Wheeled* Vehicle Suspension" he had invented could operate. Instead, the Court specifically found:

> "The Turner patent derives a large portion of its inventiveness from the unique way in which *the combination of its parts* function to produce new, unexpected and synergistic results. It does not recite old combinations. . . ." [Ap. 36a]

Dura never appealed this finding. However, in its affirming opinion, the Sixth Circuit took particular note of the inter-relationship of the parts of the invention, including the wheels and axles [Ap. 45a], noting itself, the title "Wheeled Vehicle Suspension", and later referring to the invention as an "axle" suspension. It is almost trite to say that without its wheels and axles the Turner invention would be utterly useless.

There is little doubt that the District Court and Sixth Circuit considered the wheels and axles as part of the patented lift *axle* suspension as a matter of fact and law. For that matter, so did Dura until it was faced with the amount of the damage its willful infringement had caused.

For all these reasons, Dura's Question No. 1 is meaningless to the outcome of the case. The "patented item" includes the wheels and axles, and all other essential parts of the "Wheeled Vehicle Suspension" that Mr. Turner invented and Dura wrongfully profited from.

IV. The "Entire Market Value Rule" Is An Historic Recognition Of How To Properly Assess Compensatory Damages Caused By A Tort-Feasor And Does Not Conflict With The Misuse Doctrine

The Patent Act, 35 U.S.C. §284, [quoted in full in the petition, pg. 11] directs that a court *must* award "damages adequate to compensate for the infringement". This has also been stated by Mr. Justice Brennan of this Court in interpreting §284 in *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 504-506, 84 S.Ct. 1526, 1541-1543 (1964). The lower courts in this case have merely followed this mandate:

The Magistrate first found that it was impossible to apportion out the wheels and axles because the wrongdoer had no documents [Ap. 76a]. The Magistrate then found that a "fair and just" compensatory damage *base* adequate to compensate for the infringement would *only* be that money obtained proximately and directly from Dura's act of infringement (namely, the $20,859,889 collected from the direct sales of Dura's infringing Model 1400 to its customers) [Ap. 76a]. Such is directly in accord with *Aro*, supra, as cited by the Magistrate [Ap. 67a].

It is no longer contested by Dura that due to its tort of infringement, TWM was proximately damaged by Dura's sale of the wheels and axles of a Model 1400, the same as it was by Dura's sale of the airbags, U-bolts, or any other part of the suspension [Ap. 9a]. To exclude any of these parts, then, would be directly contrary to the mandate of §284 to award *adequate* damages to *compensate for the*

infringement[12]. It would have been improper, furthermore, even under the old law because of this, and because of the integral nature of the wheels and axles as included in the base. This, in turn, is all that the "Entire Market Value Rule" is, and always has been since its establishment almost a century ago by this Court. See *Hurlbut* v. *Schillinger*, 130 U.S. 456, 472, 9 S.Ct. 548, 589 (1889); *Warren* v. *Keep*, 155 U.S. 165, 268 (1894); *Westinghouse Electric and Mfg. Co.* v. *Wagner Electric and Mfg. Co.*, 225 U.S. 604, 614 (1912). The District Court in adding this rule merely to further support what the Magistrate had done, and the Federal Circuit in affirming, did what other courts have done[13]. They merely consistently applied[14] this rule as it has existed for almost 100 years, to insure the adequacy of the award, commensurate with the damage caused, as mandated by Congress. There is, of course, no conflict with the misuse doctrine. The

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[12] The failure to recognize that in 1946 Congress changed the law of recovery in patent cases to a conventional "compensatory damage" standard (see *Aro Mfg. Co.*, supra) is a fundamental flaw in Dura's argument regarding the damage base, and its unusual attempt to equate it to some anticompetitive, antitrust problem. There is, therefore, no conflict with the *Dawson* case as argued by Dura [Pet. pg. 10]. The first doctrine has no affect upon commerce. It merely compensates adequately for a wrong done. The second prohibits ongoing unreasonable restraints on trade.

[13] See *American Safety Table Co.* v. *Schreiber*, 415 F.2d 373 (2d Cir. 1969) and *Tektronix, Inc. v. U. S.*, 552 F.2d 343 (Ct. Cl. 1977)

[14] Dura's Brief cites three Fed. Cir. cases applying the rule, but fails to bring out a fourth Federal Circuit case restricting the District Court's application of this doctrine. *King Instrument Corp.* v. *Otari Corp.*, 767 F.2d 853, 865-6 (Fed. Cir. 1985)

one compensates for a wrong done. The other prohibits ongoing unreasonable restraints on trade.

Dura should not be heard to argue that the award is excessive in this case because when trebled, with statutorily mandated prejudgment interest running from 1967 [§284], it exceeds the sales volume of the infringement. That is a naked argument which falls when placed in its proper context.

If Dura's 52.7% profit estimate [Ap. 71a] which inspired it to willfully infringe the patent from 1967–1981 turned out to be correct, the compensatory base and rate awarded for the royalty and lost profits *leaves to Dura* millions of dollars in profit (actually greater than the 22.5% industry average [Ap. 69a]) *after* it pays the royalty and the lost profits as assessed by the Magistrate. Nothing could be fairer than that. It is a matter of simple mathematics that through routine corporate investment of a 52.7% profit over the two decades it has held the money, Dura may end up profiting from its willful wrongdoing even when all the prejudgment interest is assessed, even if the damages it caused had been doubled, and in all probability even after they were trebled to reach the $31,000,000 level. In short, by protracting this litigation, Dura may have been able to assure itself of a profit despite the outcome. We will never know, of course, because Dura lost its documents just before an accounting could take place [fn. 4].

V. Dura's Behavior Was Reprehensible: It Was Not Simply An Innocent Victim Of An "Access + Similarity" Rule

Dura's behavior from 1966 to 1981, when it went even further and violated the injunction [Ap. 57a],

was reprehensible. Dura is not just some victim of an "access + similarity" rule, as it argues.

Dura's behavior was all before the District Court in 1981. Much of it was before the Sixth Circuit in 1979, and again in 1983. Only some of it was before the Magistrate in 1984. It was again brought up before the District Court hearing whether enhanced damages should be awarded in 1985. And finally, some of it was before the Federal Circuit in 1986.

In all *six* instances, each of these *four* judicial bodies found egregious misconduct on the part of Dura or affirmed the lower tribunal's finding thereof as not clearly erroneous. The Sixth Circuit in 1979 reversed summary judgment on laches and estoppel, finding a substantial showing in the record of inequitable conduct and remanding for trial [Ap. 29a]. The District Court heard it all in 1981 and the Magistrate heard much of it in 1984, from the intimidation of Mr. Turner by Dura, telling him a false story to try to make him believe his patent was invalid [see RA 27-28]; to its sending its investigative Attorney, David Maxon, to Turner's hometown to "beard the patentee in his den" [RA 32], and finding no prior art but advising anyway not to "cave in" to Mr. Turner and accept his offer [RA 34] based on an unsupported and unbelieved [RA 36] earlier opinion speculating on bizarre grounds for raising invalidity and noninfringement arguments; to its attempt to buy up his patent through a surreptitious third party so Turner would not demand the back moneys due him, and offer a low price believing he had no exclusivity to sell to a third party because of huge Dura's (Kidde's) entrenched infringement [RA 37]; to the testimony of an actual eye witness to the copying [RA 18-26] by

Dura's in-house engineer, Don McGee, and outside consultant, Sam C. Verdi (a former bodyguard of Jimmy Hoffa [RA 18] declared a perjuror by the District Court [RA 15-16, 30]); to all of the documents testified to by Professor Kayton reflecting that Dura well knew the Turner patent was valid and infringed [RA 27-28, 60-68] to the discrediting behavior of Attorney, David Maxon, who had done the studies of the Turner patent and was declared "totally not worthy of belief at all" [RA 29, see also RA 17].

The District Court, quite properly found willful infringement amounting to egregious "misconduct" sufficient to negate laches and give rise to the issue of enhanced damages under §284, and its Opinion in this regard was affirmed by the Sixth Circuit in 1983. In affirming the District Court's holding of egregious misconduct, the Sixth Circuit noted, in response to Dura's arguments that it had independently originated the Model 1400:

> "... there is considerable evidence to suggest that Verdi [Dura's "consultant"] plagiarized the Turner patent." [Ap. 50a]

So much for Dura's contention that it has merely been the innocent victim of some procedural "access + similarity" copyright rule. It is TWM that has been the innocent victim. As Judge Gilmore stated in his 1981 opinion:

> "Plaintiff was an innocent entrepreneur in this case who I think was done in by the Defendant". [Ap. 41a]

The Magistrate heard, as noted above, only some of this evidence, yet advised enhancement of the damages. The Federal Circuit, with more than just a little

working knowledge of the patent system, found no abuse of discretion, and affirmed. It strains credulity to argue that all of these tribunals can be wrong and Dura right. Not with the evidence in this record, as its massive weight proclaims.

CONCLUSION

Dura's Questions raise no national issue of any import. This case originated from the Sixth Circuit's affirmance of the District Court's Opinion of 1981, and the Federal Circuit merely applied recognized appellate standards in affirming.

Dura fails to cite a single case in conflict with the questioned rulings of the Federal Circuit, except for its misapplied attempt to cite misuse cases.

The case is a patent case in its accounting phase dependent, as such cases usually are, upon the accumulation of facts derived from two trials and in this case, three appellate reviews by two different non-conflicting Circuits. Dura is an adjudicated willful tort-feasor and a contemnor who engaged in egregious misconduct. It comes to this Court in a case heavily dependent on extensively accumulated facts, and poses questions having no bearing on the ultimate outcome of this case. Dura seeks only to delay the inevitable time when it must pay the money which it commenced owing 20 years ago after it unlawfully took another man's patented invention for its own substantial gain. It is simply time to stop the protraction and make Dura pay what it owes.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

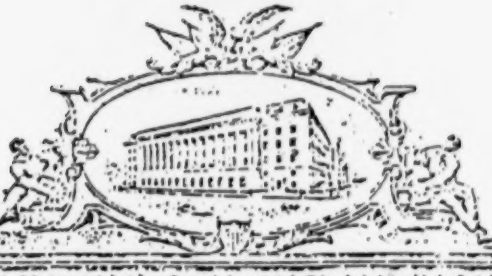
GEOFFREY R. MYERS
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Counsel for Respondent

APPENDIX

BEST AVAILABLE COPY

APPENDIX A



3285621

UNITED STATES PATENT OFFICE

TO ALL TO WHOM THESE PRESENTS SHALL COME:

Whereas, THERE HAS BEEN PRESENTED TO THE

Commissioner of Patents

A PETITION PRAYING FOR THE GRANT OF LETTERS PATENT FOR AN ALLEGED NEW AND USEFUL INVENTION THE TITLE AND DESCRIPTION OF WHICH ARE CONTAINED IN THE SPECIFICATION OF WHICH A COPY IS HEREUNTO ANNEXED AND MADE A PART HEREOF, AND THE VARIOUS REQUIREMENTS OF LAW IN SUCH CASES MADE AND PROVIDED HAVE BEEN COMPLIED WITH, AND THE TITLE THERETO IS, FROM THE RECORDS OF THE PATENT OFFICE IN THE CLAIMANT(S) INDICATED IN THE SAID COPY, AND WHEREAS, UPON DUE EXAMINATION MADE, THE SAID CLAIMANT(S) IS(ARE) ADJUDGED TO BE ENTITLED TO A PATENT UNDER THE LAW.

NOW, THEREFORE, THESE Letters Patent ARE TO GRANT UNTO THE SAID CLAIMANT(S) AND THE SUCCESSORS, HEIRS OR ASSIGNS OF THE SAID CLAIMANT(S) FOR THE TERM OF SEVENTEEN YEARS FROM THE DATE OF THIS GRANT, SUBJECT TO THE PAYMENT OF ISSUE FEES AS PROVIDED BY LAW, THE RIGHT TO EXCLUDE OTHERS FROM MAKING, USING OR SELLING THE SAID INVENTION THROUGHOUT THE UNITED STATES.

In testimony whereof I have hereunto set my hand, and caused the seal of the Patent Office to be affixed, at the City of Washington this fifteenth day of November, in the year of our Lord one thousand nine hundred and sixty-six, and of the Independence of the United States of America the one hundred and ninety-first.

Attest:

Edward J. Brenner
Commissioner of Patents

PLAINTIFF'S EXHIBIT 2

Nov. 15, 1966 S. TURNER, JR 3,285,621

WHEELED VEHICLE SUSPENSION

Filed Jan. 12, 1965 4 Sheets-Sheet 4

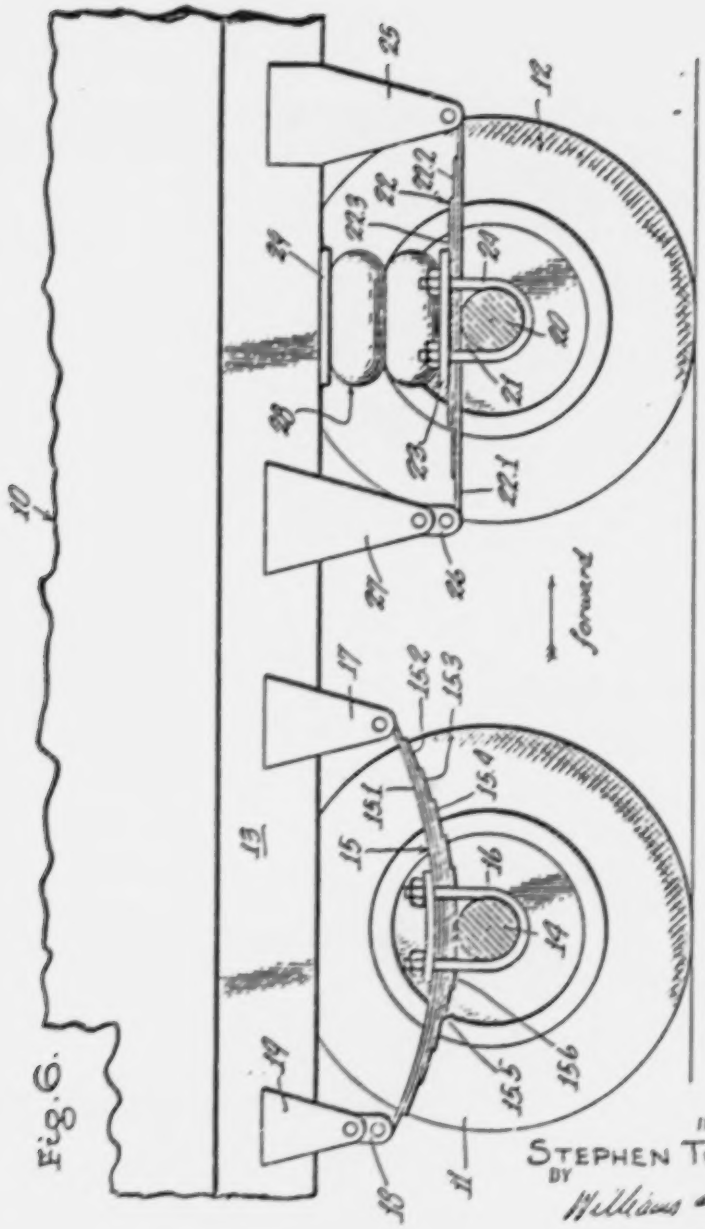


Fig. 6.

INVENTOR.
STEPHEN TURNER, JR.
BY
Williams and Woods
ATTORNEYS

Nov. 15, 1966 S. TURNER, JR 3,285,621

WHEELED VEHICLE SUSPENSION

Filed Jan. 12, 1965 4 Sheets-Sheet 3

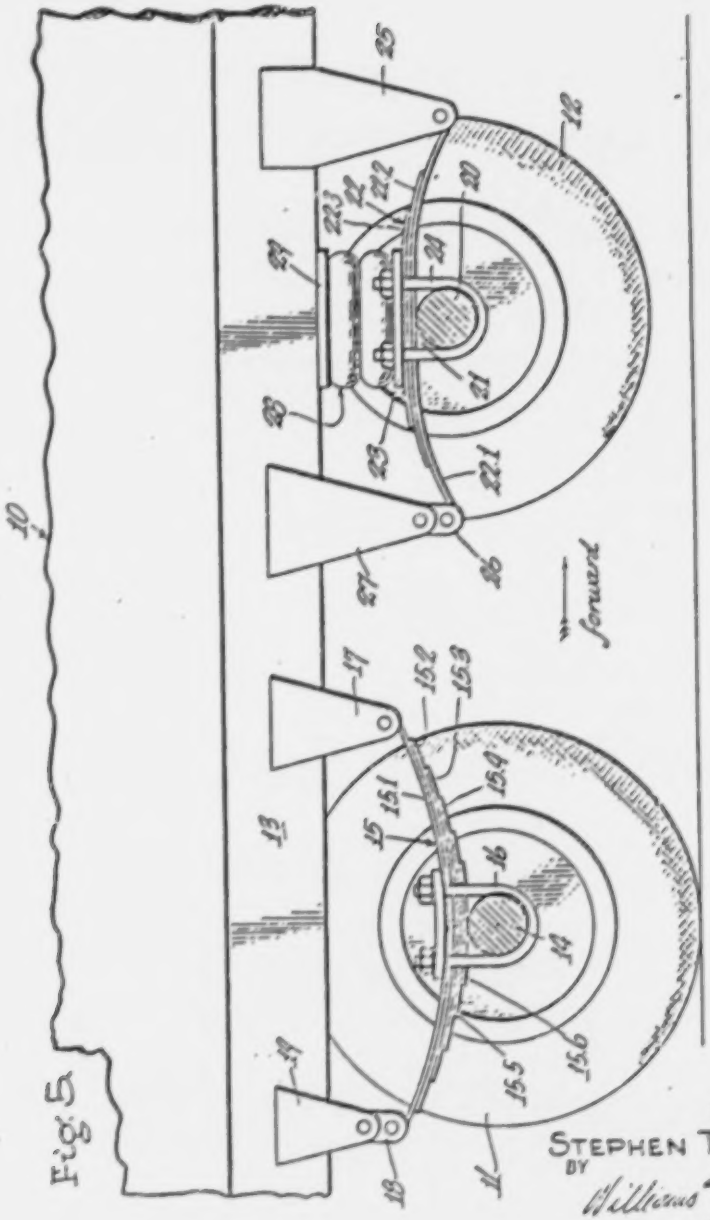


Fig. 5

INVENTOR
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BY
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Nov. 15, 1966 S. TURNER, JR 3,285,621

WHEELED VEHICLE SUSPENSION

Filed Jan. 12, 1965 4 Sheets-Sheet 2

Fig. 3.

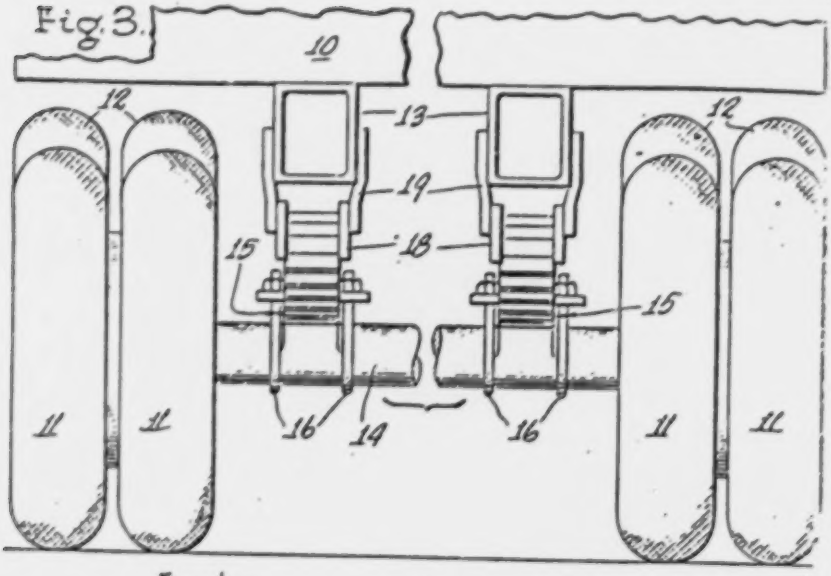
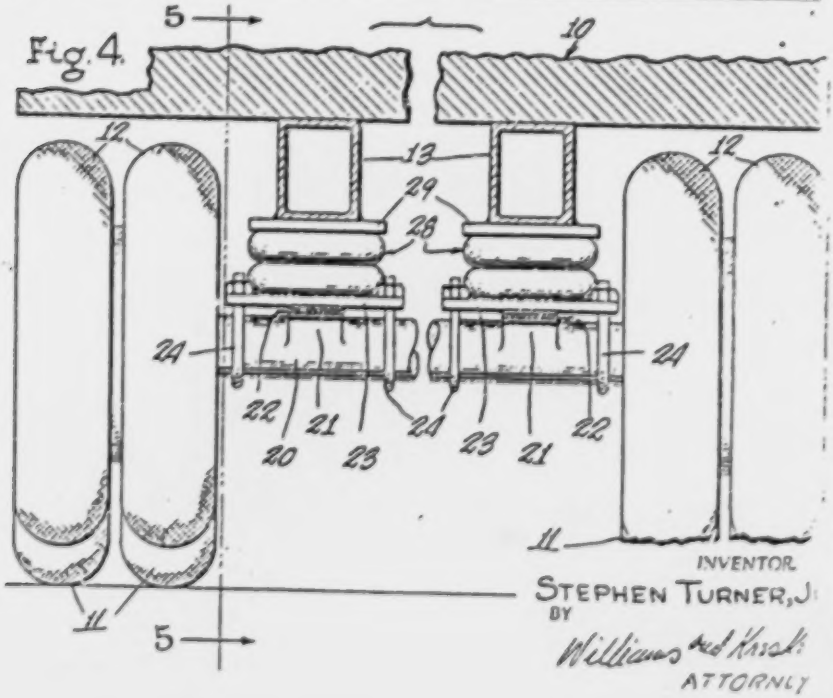


Fig. 4.



INVENTOR.
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BY
Williams and Kirsch
ATTORNEY

Nov. 15, 1966 S. TURNER, JR 3,265,621

WHEELED VEHICLE SUSPENSION

Filed Jan. 12, 1965 4 Sheets-Sheet 1

Fig. 1.

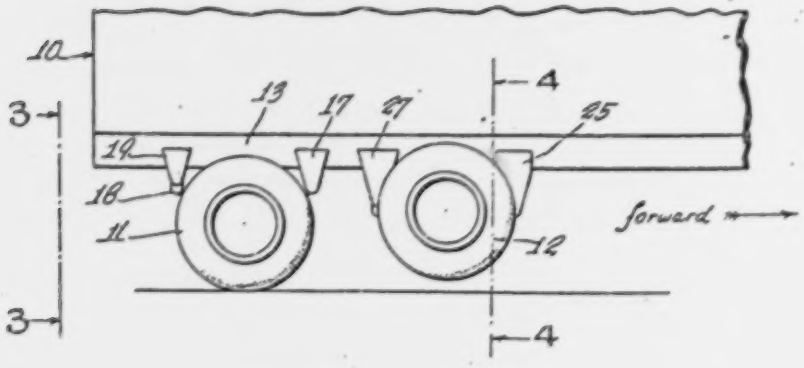


Fig. 2.

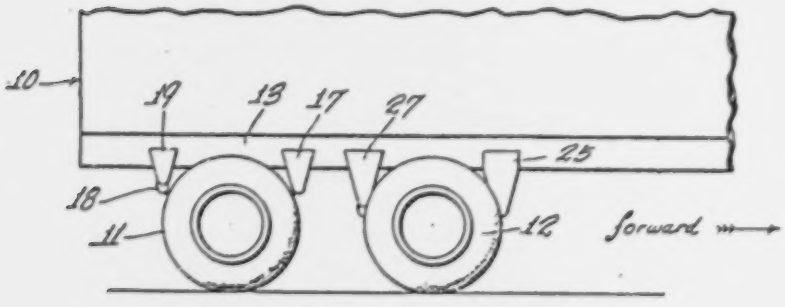
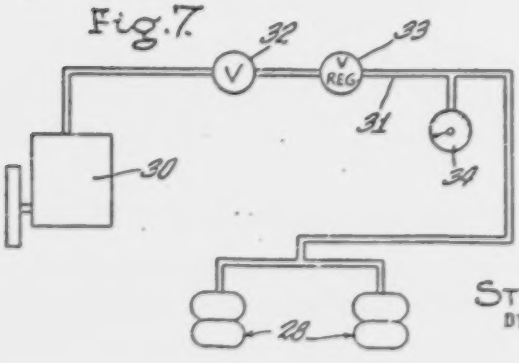


Fig. 7.



INVENTOR
STEPHEN TURNER, JR
BY
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United States Patent Office 3,285,621
Patented Nov. 15, 1966

3,285,621
WHEELED VEHICLE SUSPENSION

Stephen Turner, Jr., 6611 Belmont Ave., Girard, Ohio

Filed Jan. 12, 1965, Ser. No. 424,933
3 Claims. (CL. 280—81)

The present invention relates to wheeled vehicles, more particularly to suspensions for wheeled vehicles such as trucks and trailers, and the principal object of the invention it to provide new and improved vehicular suspensions.

It is well-known that in a load-carrying wheeled vehicle, the greater the number of load-carrying wheels, the greater the load which can be carried without damage to the road surface. Indeed, while most states limit the gross weight of a vehicle traveling on state roads, many states specify a gross weight which each axle of the vehicle may support. In such cases, it follows that the greater the number of wheel-bearing axles on the vehicle, the greater will be the allowed gross weight. Unfortunately, the greater the number of axles spaced longitudinally of the vehicle, the greater the tire scuffing when the vehicle turns and the greater the tire scuffing when the vehicle turns and the greater the power requirements to overcome the drag of such scuffing.

In order to alleviate the aforesaid tire scuffing when multiple axle suspensions are employed, it has been proposed to steer or easter one or more of such multiple axles. This, however, is a very complex and expensive solution which is not always adaptable to existing vehicles.

Another proposed solution to multiple-axle tire scuffing aforesaid, and that contemplated by the present invention, is to provide one or more auxiliary axles on the vehicle

which can be selectively used only when necessary. Thus, when a light load is being carried, the auxiliary axle may be raised to elevate its wheels above the road surface. On the other hand, when the additional load-carrying capacity of such auxiliary axle is required, the axle may be lowered to bring its wheels to engagement with the road surface with sufficient force that such axle will carry its proportionate share of the vehicle load. Tire wear on the auxiliary axle, therefore, will not occur when loads are light and the auxiliary axle is not in use. While at first glance it may appear that non-use of an auxiliary axle only during light-load vehicle operation would not greatly help the tire scuffing problem, it should be kept in mind that many vehicles travel lightly loaded about the same distance as they travel heavily loaded. Furthermore, when heavily loaded, vehicles tend to travel at a lower speed thus making tire scuffing less of a problem than it is at higher speeds.

By utilizing the principle of an auxiliary vehicle axle which is selectively shiftable toward and away from the road surface, the present invention provides for increased load capacity of the vehicle while minimizing tire scuffing, power consumption and limitations on maneuverability of the vehicle. These and other advantages will readily become apparent from a study of the following description and from the drawings appended hereto, and in these drawings:

FIGURE 1 is a fragmentary, side elevational view of the rear portion of a vehicle embodying the present invention, the auxiliary axle of the present invention being shown in a non-supporting position relative to the vehicle.

FIGURE 2 is a view similar to FIGURE 1 but with the auxiliary axle of the present invention being shown in a supporting position relative to the vehicle,

FIGURE 3 is a broken, enlarged fragmentary rear elevational view generally corresponding to the line 3—3 of FIGURE 1.

FIGURE 4 is a broken, enlarged fragmentary sectional view generally corresponding to the line 4—4 of FIGURE 1,

FIGURE 5 is a fragmentary sectional view generally corresponding to the line 5—5 of FIGURE 4,

FIGURE 6 is a view similar to FIGURE 5 but with parts shown in another position, and

FIGURE 7 is a diagrammatic view of means for controlling operation of the auxiliary axle shown herein.

With reference to FIGURES 1 and 2, a wheeled vehicle, such as a semi-trailer 10 having the usual supporting wheels **11**, in the position of parts shown, is another set of wheels 12 which may selectively be positioned in the non-supporting position seen in FIGURE 1 or in the supporting position seen in FIGURE 2. As best seen in FIGURES 3 and 5, the trailer 10 has the usual pair of longitudinally extending frame members **13** in side-by-side relation to which the wheels **11** are secured. Wheels **11** are herein shown to comprise dual wheels rotatably mounted in axially spaced relation to an axle **14** whereby respective dual wheels are disposed on opposite sides of the trailer.

Any conventional means may be employed to resiliently secure the axle **14** to the frame members **13**. For example, in the present embodiment, a pair of leaf springs **15** underlie respective frame members and have their intermediate portions secured to respective axle portions by means of U bolts **16**. The forward end of each leaf spring **15** is pivotally secured to respective brackets **17** depending from respective frame members while the rear end of each leaf spring is pivotally secured via a shackle **18** to respective brackets **19** depending from respective frame members **13**.

In accordance with conventional practise, it will be noted that each spring **15** is formed of an upper, main leaf 15.1 and a plurality of progressively shorter, secondary leaves **15.2, 15.3, 15.4, 15.5** and **15.6** underlying such main leaf.

Wheels **14**, and with reference to FIGURE 4 and 5, are herein shown to comprise dual wheels rotatably mounted in axially spaced relation on an axle **20** which may be similar to axle **14**. Axle **20** has upwardly facing spring seats **21** to which are secured the intermediate portions of respective leaf springs **22** which underlie respective frame members **13**. For a purpose to appear, a relatively large metal plate **23** overlies each spring **22** and U bolts **24** draw the plates toward the axle to secure said springs thereto. In a manner similar to spring **15**, each spring **22** has its forward end pivotally secured to respective brackets **25** depending from respective frame members **13** and the rear end of each is pivotally secured via a shackle **26** to respective brackets **27** depending from respective frame members.

Spring **22** differs from spring **15** in that while it is shown to be formed of a main leaf **22.1** and progressively shorter secondary leaves **22.2, 22.3** the main leaf **22.1** is lowermost rather than uppermost. Thus, while the spring **15** normally urges its axle downwardly away from the frame members **13**, spring **22** functions in a reverse manner to normally urge its axle upwardly toward the frame members **13** whereby the wheels **12** are spaced above the underlying road surface as clearly illustrated in FIGURES 1, 4 and 5. Since springs **22** need only exert sufficient force to support the weight of axle **20** and its wheels **12**, each spring **22** is shown to be formed of only the two secondary leaves previously mentioned in addition to the main leaf.

In view of the fact that springs **22** normally maintain the axle **20** in the position seen in FIGURES 1, 4, and 5 wherein the wheels **12** are supported above and out of

engagement with the underlying road surface, means are provided to overcome the force of springs **22** to urge the wheels **12** downwardly to engagement with the road surface whereby such wheels will carry a proportionate share of the weight of the vehicle. As viewed in FIGURES 4 and 5, a pair of vertically extensible (in the position of parts shown) bellows or air bags **28** are employed for urging the wheels **12** of axle **20** to road engagement. The air bags **28** are preferably interposed between the axle **20** and respective frame members **13**, the lower end of each air bag being seated upon respective plates **23** and the upper end of each being seated against plates **29** welded or otherwise secured to the underside of respective frame members.

With the construction thus far disclosed and as best seen in FIGURES 1 and 5 wherein the parts are illustrated in normal position, it will be noted that the wheels **12** are elevated above the road surface in a non-use position. This will normally be the position of wheels **12** when the vehicle is either empty, lightly loaded, or whenever the additional load capacity of the wheels **12** is not required.

When, however, it is desired to employ the additional load capacity of the wheels **12**, compressed air will be admitted to the air bags **28** to cause vertical extension thereof thus urging the wheels **12** downwardly against the relatively light force exerted by the springs **22** to engagement with the road surface as shown in FIGURES 2 and 6. Preferably, the amount of air pressure admitted to the air bags **28** will be such that wheels **12** will be forced downwardly an amount to carry their proportionate share of the vehicle load. This, of course, divides the load of the vehicle between the two sets of wheels **11** and **12** in any desired proportion. When use of the wheels **12** is no longer required, air will be released from the air bags whereupon the springs **22** will return the wheels **12** to the position seen in FIGURES 1 and 5.

As a source of air pressure for the bags **28** and with reference to FIGURE 7, the tractor which draws the trailer herein shown may carry the usual engine driven compressor **30** having suitable conduit connection **31** with the air bags. Interposed in the conduit **31** and preferably disposed in the cab of the tractor for ease of operation by the driver is a manual control valve **32,** an adjustable, pressure regulating valve **33,** and a gauge **34** which shows the air pressure within the air bags. Valve **32,** of course, controls admission to or release of air pressure from the air bags, valve **33** controls the amount of air pressure admitted to the air bags, and gauge **34** indicates the amount of air pressure in the air bags thus informing the driver of the degree of load support provided by the wheels **12.**

It is to be understood that while a single auxiliary axle **20** has herein been shown and described as being applied to a semi-trailer having a single main axle, this has been done for illustration only and more than one such auxiliary axle may be applied to trailers of any type having one, tow or more main axles. Moreover, the auxiliary axle herein shown is not limited to application to trailers but may as well be applied to trucks, tractors or other vehicles having any number of main axles.

In view of the foregoing it will be apparent to those skilled in the art that I have accomplished at least the principal object of my invention and it will also be apparent to those skilled in the art that the embodiment herein described may be variously changed and modified, without departing from the spirit of the invention, and that the invention is capable of uses and has advantages not herein specifically described; hence it will be appreciated that the herein disclosed embodiment is illustrative only, and that my invention is not limited thereto.

I claim:

1. A wheeled vehicle having longitudinally extending frame members in side-by-side relation and each frame member being disposed adjacent a respective side of said vehicle, first and second axles underlying said frame members and extending transversely thereof, said axles being spaced from each other longitudinally of said vehicle and each mounting wheels along which the vehicle may travel, means connecting said first axle to said frame members whereby said first axle provides a primary means of vehicle support, a leaf spring on each side of said vehicle adjacent respective frame members and extending longitudinally thereof, each leaf spring having its end portions secured to respective frame members and having its intermediate portion overlying and secured to said second axle, said leaf springs cooperating to normally bias said second axle upwardly to raise the wheels mounted thereon above the surface along which the vehicle travels, vertically flexible pneumatic chambers extending between respective frame members and said second axle, and means for selectively applying pneumatic pressure to said chambers to cause vertical elongation thereof thus biasing said second axle downwardly against the force exerted by said springs to lower the wheels mounted thereon to forceable engagement with the vehicle travel surface.

2. The construction of claim 1 wherein each leaf spring is formed of an elongated main leaf whose ends are secured to respective frame members and an auxiliary leaf secured to the upper side of a respective main leaf and shorter in length than the latter.

3. In a wheeled vehicle, the combination comprising first and second axles extending transversely of said vehicle and spaced from each other longitudinally thereof and each mounting wheels on opposite sides of said vehicle along which the latter may travel, means connecting said first axle to said vehicle whereby said first axle and the wheels mounted thereon provide a primary means of vehicle support, a pair of leaf springs extending longitudinally of said

vehicle support, a pair of leaf springs extending longitudinally of said vehicle on opposite sides thereof, each leaf spring having its end portions secured to said vehicle and its intermediate portion secured to said second axle and said leaf springs being mounted to normally exert a force which elevates said second axle and which raises the wheels mounted thereon above the surface along which the vehicle travels, a pair of extensible-retractable pneumatic motors on opposite sides of said vehicle and connecting said second axle to the latter, and means for selectively applying pneumatic pressure to said motors and forcing said second axle downwardly against the force exerted by said springs thereby lowering the wheels mounted on said second axle to forceable engagement with said vehicle travel surface.

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KENNETH H. BETTS, *Primary Examiner.*

APPENDIX B

*****

know who Turner was. We handed him the whole thing. He didn't see the letter, he didn't see the patent application.

The Court: What happened to the application. You receive it. What happened to it?

Mr. Van Santen: I suspect that—Page & Page was spun off at some point. It could well be that it disappeared into space.

The Court: Page & Page was spun off long after you started to make the Dura 1400.

Mr. Van Santen: Your Honor, I have no idea what happened to that application. Either myself or Mr. Morris attented all these depositions from coast to coast. All these witnesses were—

The Court: (interposing) Don't you think [43] there should be some responsibility on you to come up and explain? I mean now we don't know what happened to it. All of a sudden you appear with the Dura 1400, which is claimed to be infringing, which is very similar. Whether it is infringing or not we will get to eventually, but all of a sudden you come up with something that is very similar. You had gotton the patent application and now you say we don't know what happened to it. Plaintiff says we don't know what happened to it. Who equitably should suffer from that? That is the question I guess I am asking.

Mr. Van Santen: Well, in the first place, there is no legal principle that someone should suffer.

The Court: Well, there is a legal principle that if you copy or plagiarize this invention, then that goes to the issue of laches because that is specifically what the Sixth Circuit said in *TWM* v. *Dura*.

Mr. Van Santen: We have proved very affirmatively that we have discharged, if there is any burden placed on our shoulders, that we have discharged that burden because we have proved affirmatively that Sam Verdi came up with this development completely independently.

The Court: Now hasn't Verdi been proved to be a perjurer?

Mr. Van Santen: Well, not in this regard.

The Court: Well, maybe not in this regard, [44] but isn't there an old rule that says if you find a witness willfully lied as to a material portion of his testimony, you can disregard all the testimony of that witness? I didn't see Mr. Verdi, but it has been conceded that he was a perjurer, not on this point but on other points.

Mr. Van Santen: In this regard, your Honor, I think it is appropriate that I address this point and try to explain to your Honor how I view it.

The Court: Are you talking about Verdi now?

Mr. Van Santen: Verdi, yes. We are talking about Sam Verdi, not David Maxon because I think that is something else again.

The record is clear, and this was even admitted by people like Al Smith, that Sam Verdi had extensive activity and experience in suspensions. Now I am not saying lift suspensions. some of those suspensions were proportioning devices which did not lift the wheels completely clear of the pavement.

The Court: I don't want to cut you off, but I do want to get to one question because we are running out of time. The question I am asking, you are relying to some extent upon your defense of the Page & Page thing, upon what Verdi said with reference to ever seeing the Turner patent. That's number one. You are saying you have got to look at Verdi along with all this other testimony. My [4t] ques-

tion to you is everyone has conceded that on another point, not on this point, but on another point Verdi lied. Willfully, intentionally perjured himself. My question to you, sir, is why should I then give any credi-

The Court: (Interposing) He testified he dian't know Turner prior to the litigation. He hadn't seen his patent application prior to the litigation. That he worked for Dura from 1960 to 1968, and he said the Dura 1400 was acquired from Verdi. Okay, Go ahead.

Mr. Van Santen: Well, that's—since Sam Verdi, Truck Aids, that was his company, and well you heard the testimony of Al Smith. Al Smith was—how about that? Now here he was a Ford employee and he was moonlighting for Truck Aids. As I understand it, that's completely contrary to Ford's policies, but, you known, we are not going to argue that you should wipe everything out there. But he admitted [47] that Sam Verdi was—had extensive activity.

The Court: Sir, I will ask you to wind up in the next three minutes. Your time will be up then.

Mr. Van Santen: All right. In the time remaining, I do want to point out, in talking about attorneys fees, if anybody is aggrieved in this case, this is hardly a case where some poor individual lacked the $60,000 budget to sue. Steven Turner has long been shuttled off to Florida, and meanwhile Dura has been led down this long, difficult and expensive road by a cast of protagonists that include at least eight lawyers.

Now I think the thing that really makes this an exceptional case is that after Judge Kaess got this action already for trial and disposed of it in 1975 on the laches and estoppel issue, the Plaintiffs went down to Cincinati and before CA6, on the basis of contrived and worthless charges, created a doubt on this plagiarism and harassment, and then came to this Court and tried to prove and

resolve that doubt with the same charges. This Court found that those charges rested principally on, as I believe, David Maxon's testimony, and right in the record your Honor held that his testimony was to be completely disregarded, was a lie and worthless evidence. That's at the trial transcript at 1034.

The Court: Yes, I agree, Mr. Maxon didn't testify as far as I am concerned in this case.

[48] Mr. Van Santen: Well anyhow, I think to create the doubt in the first place and then try to resolve the doubt on the basis of that kind of testimony, I submit that that is, if anything was ever disingenuous, I think that was so disingenous as to make this case exceptional under 285.

Dura has performed a public service by enduring these type of charges and onslaughts, and we are giving the Court an opportunity to confine this patent to what the late Justice Douglas called the incredible list of invalid patents that the Patent Office has spawned. I think in all equity Dura should be awarded its attorneys fees and the requisite findings to support the ward.

CERTIFICATE

I, Elizabeth A. Higdon, do hereby certify that I reported stenographically the proceedings had in the above-entitled cause before the Honorable Horace W. Gilmore, United States District Judge, at the time and place here-inbefore set forth; that the same was thereafter reduced to typewritten form under my supervision; and I do further certify that the foregoing transcript is a full, true and correct transcript of my stenographic notes.

/s/ ELIXABETH A. HIGDON
ELIZABETH A. HIGDON

Date: Detroit, Michigan
March 1, 1982

APPENDIX C

* * * * *

totype shop was too heavy, was too heavy to accommodate our time frame requirements, then we would farm that work out. And Truck Aids Manufacturing was one of the companies that we farmed that work out. to.

Q What would they do with the prototype?

A They would install whatever we told them to on one of our trucks or tractors.

Q Do you know what Mr. Verdi's background was prior to his Truck Aids Manufacturing business?

A I do know he had been heavily involved with the Teamsters. I know he had been a bodyguard for Jimmy Hoffa. I know he also—he had been involved in the truck business.

Q What, if any, relationship did you have with Mr. Verdi other than the SAMCO business?

A He was a friend.

Q At the time you joined SAMCO in the fall of 1965, did Mr. Verdi or anyone in his palace or in connection with him at his facility have an operable lift axle suspension system at that time?

A Not that I was aware of.

Q Did Mr. Verdi have a lift axle suspension system for sale at that time?

A No.

Q At the time you joined SAMCO, were either Mr. Sam Verdi—let me back up an lay a predicate for that.

When you joined SAMCO, was there anybody else with Mr. Verdi in SAMCO moonlighting with you?

A Just Marty.

And I should explain that at that time within the Ford organization Marty reported directly to me. And it was just the three of us.

Q And before you joined SAMCO, did you know that Mr. Eckonen was moonlighting over with Sam Verdi?

A Sure.

Q And at the time you joined SAMCO in the fall of '6t, were either Mr. Verdi or Marty Eckonen working on a lift axle suspension system?

A Yes, they were.

Q Now, would you describe what they were doing at that time when you joined them in the fall of '65 with regard to the lift axle suspension system?

A Yes, I will. I think I should first explain that Sam had no ability to design. He could direct a mechanic and say, "Cut it here and drill it there," and that is the kind of a fellow that Sam was. What he was looking for was someone like Marty or myself who could in fact design it on paper before it got built.

Now, they were working on this system that utilized four load-supporting air bags and two air cylinders to lift the axles.

Q At this time, I would like to direct your attention to Plaintiff's Exhibit #9, and ask if you can identify that for us, please.

A Yes, I can.

MR. MYERS: Your Honor, I think you are going to find that in an envelope. It should be in an envelope.

Q (By Mr. Myers, continuing) What, if any, relationship—first of all, can you identify that document?

A Yes, I can.

Q Do you bear any relationship to that document?

A Yes; I drew it.

Q Then, at the bottom of the page, do you find a date there?

A 12-2-65.

Q Is that an accurate date on which that document was made?

A It must be, it is my lettering.

Q Does your name or your initials, are they found on that document?

A They are.

MR. MYERS: At this time, I would like to offer Plaintiff's Exhibit #9 into evidence, your Honor.

THE COURT: Any objection?

MR. VAN SANTEN: Not on authenticity, but I object to it in terms of relevance and materiality.

THE COURT: What is the relevance?

MR. MYERS: He is going to describe what the unit was that Mr. Verdi was working on when he came into the shop in 1965. We are going to show when the 1400 suspension system came into being.

THE COURT: All right, I will receive it.

(whereupon Plaintiff's Exhibit #9 was received in evidence)

Q (By Mr. Myers, continuing) Now, Mr. Smith, what, if any, relationship does the drawing there bear to what you were describing with regard to the suspension system that was being worked on at the time you cam into Mr. Verdi's shop?

A This is the same laminated leaf bar which was used to lift the axle.

Q Is that a complete drawing of the structure?

A The structure could be made from that drawing, yes, sir.

Q And was that the structure that—what, if anything, was done with that drawing in regard to the structure that might or might not have been ultimately completed?

A That drawing was used to buy two or three of these.

Q What was the state or condition of the unit that you have just described to us when you entered into SAMCO in the fall of '65?

A It was a combination of rough sketches and a lot of talk.

Q Had they built any of the parts yet?

A No.

Q Now I would like to refer you to page five hundred sixty-seven of Plaintiff's Exhibit 1-b. That is page five hundred sixty-seven.

THE COURT: All right.

Q (By Mr. Myers, continuing) What, if any, relationship does—are you familiar with the document there?

A Yes, I am.

Q All right. What, if any, relationship does the unit shown in that document bear to what you were just describing?

A The same thing.

Q That is the unit that was -

A (Interposing) Yes.

Q And do you remember when it got built eventually?

A Around Christmastime of '65, possibly a little bit afterwards.

In other words, what we did was build a half unit, one side of the frame and then one side of all the pieces. And it was a demo. Sam put it in the, quotation marks, lobby of Truck Aids Manufacturing.

Q Have you read that patent?

A Yes, I have.

Q Does it accurately describe the operation of the model that you have just referred to?

A Reasonably.

Q At the time that Mr. Verdi and Mr. Eckonen and you were working on this, did you express any opinions to them regarding this unit?

A I didn't like it very well.

Q Why not?

A Well, one of—let's recognize that this was conceived by Sam, this was essentially his idea, and one of the goals was to make a quick lift axle with at least six inches of ground clearance, tire to ground.

Now, this leaf laminated bar was on of my concerns. I felt that that thing was going to deflect too much.

I think that, you know, the time, as soon as we built one, that kind of came out pretty clear. But we had to build one first, or build a half model.

Q Do you know if this unit ever became commercial?

A I have no idea. To the best of my knowledge, it did not.

Q Were you, yourself, working on any other suspension system at that time at SAMCO, in this time frame that we are talking about, 1965, Christmas 1965?

A Yes, we were; not just I.

Q Who?

A Marty and I.

Q Okay. And would you describe that unit briefly for us?

A It was—again, I would have to give the credit for the concept to Sam Verdi. It was an attempt to make a non-lift air ride tandem suspension that could be a direct replacement for all of the then existing models of Hendrickson suspensions.

Q At this time, I would like to show you what has been identified, but not submitted into evidence, as Plaintiff's Exhibit 10, and I ask if you can identify that document for us.

A Yes, I can.

Q What, if anything, did you have to do with the document that you are holding in your hand?

A I designed it and drew it.

Q Is there a date on there?

A 11-14-65.

Q Is that when that drawing was drawn?

A Yes.

Q And you say you drew it?

A I drew it.

Q Does your name or initials appear on that?

A My initials appear.

Q And did you put those initials on there?

A Yes.And also I can identify the lettering as being my own. It is almost like a handwriting for an ex-draftsman.

MR. MYERS: Your Honor, at this time, we would like

to submit this into evidence.

THE COURT: Any objection.

MR. VAN SANTEN: No objection.

THE COURT: All right, Exhibit 10 may be received.

(Whereupon Plaintiff's Exhibit #10 was received in evidence)

Q (By Mr. Myers, continuing) Now, I just want to reflect upon the two dates. In the Exhibit 10, the date appears to be November of 1965, and the date on Exhibit 9 is December of 1965. Is that correct?

A That's correct.

Q My question is: Which one was being worked on first when you cam to SAMCO?

A The lift axle suspension.

Q And the next one, then, you got involved in the Hendrickson replacement, which is 10; is that correct?

A Yes.

Q At this time, in November and December of 1965, were there any other axle suspension systems being worked on by Mr. Verdi, SAMCO or any of the three of you in SAMCO, in that organization?

A No.

Q Now, did there come a period of time after these two units were being worked on in this November—December period, around the holiday season, when a new unit began to be worked on at SAMCO?

A Not by SAMCO.

If we go backwards in my testimony, SAMCO was Sam, Al and Marty.
Give or take a few days from Christmas of '65, Don

McGee put in an appearance at the Truck Aids Manufacturing facility, and that is when the new one started.

Q Now, you said it was Don McGee?

A Yes.

Q Do you know who Don McGee was employed by at that time?

A Yes, I do.

Q Who was that?

A Dura corporation.

Q Tell us what happened as to that unit and involving that unit's development.

A I will to the best of my ability and as I perceived it at the time and recall it today.

Don came in, as I said, more or less at christmastime, and talked with us generally and talked with Sam privately. And then over a period of weeks immediately after the holiday season, Sam began working on this model of a new suspension system. He told Marty and I very little about it initially. It was a very strange atmosphere. Here are three guys who are friends and suddenly a fourth party is there and kind of the atmosphere changes, it gets very secretive, cold, unfriendly. I didn't like it. Then, finally, you know, Sam told us what—well, he kept saying, "This guy." Saying, "This guy McGee has really got an idea." Well, finally, Sam explained to Marty and I what that idea was, and I thought it was a punk idea, myself.

Q Now, would you describe to the Court what that idea was that was described to you?

A Well, it is what we see here today as either the Turner or the dura 1400 suspension system.

Q Now, at this time, Mr. Smith, I would like to hand you a copy—I would like to refer you to Plaintiff's Exhibit

1-a, page one hundred forty-five.
Before we go into this document that is in front of you, let me just ask you this one question: You were talking about the Hendrickson replacement. Did that ever become a commercial unit?

A Not to the best of my knowledge.

Q Now, let's go on to page one hundred forty-five. What, if any, relationship does that bear to what you were just

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APPENDIX D

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Q Professor Kayton, I'm going to ask you to direct your attention at this time to certain documents found in Plaintiff's Exhibit 1-A AND 1-B, which in effect are those documents that related to Dura's investigation of the validity of the Turner patent and, namely, I will read into the record for you those documents beginning at page 285, 292, 297, 298, 299, 324, 325, 340, 368, 376, 378, 385, 397, 398, 399, 420, 422, 437, 448, 454, 464, 488, 614, 616, and 639.

Have you studied those documents?

A I studied and have them here in front of me, all of them except two and those are 327 and so on, but I looked at them all and I have all but two of them here.

Q Have you heard in this regard the testimony to the extent it existed of Mr. David Maxon yesterday in regard to those documents Dura's validity study of the Turner patent and Dura's action in relation to Turner?

A Yes.

Q What, if anything, do you find disclosed in any of these documents generated during this validity study of Dura or in any of Dura's efforts to invalidate Turner's patient that would have prohibited a U.S. Examiner from properly issuing the Turner patents?

A Absolutely nothing.

Q What, if anything, in these documents or in any of the effort of Dura to invalidate the Turner patent would prohibit an examiner from reading the allowed Turner application claims on Dura's 1400 suspension system?

A Nothing would prevent that.

Q Assuming the credibility of Mr. Janeway's testimony concerning the prior art and Mr. Maxon's admission on page 464 regarding the lack of relevancy of the railroad patents, under what circumstances could a registered patent attorney in possession of his faculties and given, assuming reasonable proficiency in his profession, assert that any of the facts uncovered by Dura in its quest to invalidate the turner claims actually in fact rendered any of the claims invalid or not infringed?

A He could only make those statements if he made them with a wanton disregard for their truth or falsity or if they were asserted in bad faith, in my opinion. I can think of no other circumstances.

Q Professor Kayton, at this time I would like to direct your attention to the file wrapper history of the Verdi patent starting at page 219 of Plaintiff's Exhibit 1-A.

MR. VAN SANTEN: I will have to object to any line of examination on this. This is no longer an issue in this case, unless counsel can point out for the patent but Mr. Maxon testified rather insistently yesterday that he considered his client to be Sam Verdi who was the inventor and, indeed, that his normal pattern of practice—

THE COURT: Don't cite Mr. Maxon's testimony. I'm totally and completely disregarding Mr. Maxon's testimony. I thought it was a complete lie and I am seriously considering contempt action. Do not cite Mr. Maxon to me. I am totally and completely disregarding his testimony. I want the record to show that and I make that finding right now.

MR. VAN SANTEN: The point is, your Honor, that Dura was not prosecuting this patent application.

THE COURT: There is a question whether Dura was through Mr. Verdi or not. Go ahead. There may have to be a factual finding on that.

MR. VAN SANTEN: In light of your ruling I think this make my objection all the more applicable and pertinent.

THE COURT: No. All I am saying I am totally disregarding Mr. Maxon's testimony. In the first place I don't think he testified to anything. He had a total lack of memory to anything of any significance. When he did testify it as totally evasive. He was totally not worthy of belief at all.

I think there is a factual question I may have to resolve, I'm not sure whether as a matter of fact this patent was pursued and by Dura through Verdi. I may have to make that factual determination but in the meantime I think we can look at this and you can proceed.

MR. MYERS: Your Honor, I might point out too that I have skipped over some things in our testimony here today but in the reading of those pages of the validity study of the Turner patent, Mr. Maxon was unquestionably Dura's attorney and wrote all of these opinions and reports in here concerning whether or not Turner patent was indeed valid and non-fringed so we share the defendant's concerns about the veracity of Mr. Maxon.

It's a two edged sword. He wrote a letter that is an extremely serious letter and I was very careful.

THE COURT: You are talking about the letter on page 794?

MR. MYERS: Yes.

THE COURT: That is one i want to hear what other people have to say about that because that letter quite seriously implies, if the statute of with this inquiry. I think it's perfectly proper.

MR. VAN SANTEN: I think you ought to interrogate me then as to what I intended.

THE COURT: I don't think we can. If we do we might

have to change lawyers.

MR. VAN SANTEN: The statement, your Honor, is that Sam Verdi in compliance with 282, the statement is that Sam Verdi had knowledge of prior art activity.

THE COURT: All I am saying is—

MR. VAN SANTEN: I never represented to this Court or anybody else that we ever relied on Bodfer Dairy, or whatever it is. I don't know what it is even.

THE COURT: Mr. Verdi testified in his deposition under oath that he installed these devices on trucks of Bodker Dairy and trucks at another place, and I forget which, more than one year prior to the patent of Mr. turner. He swore in his application to the Patent Office that there was no such prior use by anyone. Therefore, he was lying one place or the other.

You have listed on your prior art statement Mr. Verdi as prior art. I think it's perfectly proper to inquire along this line in light of that.

You may proceed.

Q (By Mr. Myers, continuing) You were doing that, were you not, when we were going to go into suit in 1975, we were

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APPENDIX E

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from that moment forward and was never aggressive with Dura Corporation again.

Now, we know from those documents and the liability trial that that story about the public use was made out of complete whole sacks. It was a total misrepresentation. There was not a scintilla of evidence to represent it.

MR. MYERS: Your Honor, we'd like to direct your attention to this Turner Invention. We have submitted into evidence the Carl Risberg deposition in which Mr. Risberg's deposition we assert states that Mr. Risberg had a device that had nothing whatsoever to do with Mr. Turner's invention, and that Carl Risberg, of course, was the owner of General Trailer Works.

We also point out for the record that Page 375 shows that Mr. Max Murphy, on the day or two before he wrote the intimidating letter, what we consider the intimidating letter to Mr. Wern, was at General Trailer Works and had visited General Trailer Works and that is the basis for Plaintiff's assertion that, and the record we think clearly shows, and we submitted it into evidence in the liability trial, that this was intimidating whole cross story made up by Mr. Max Murphy and, Your Honor, we assert that the remaining documents show that Mr. Kreske backed off at that point, didn't know how to handle that situation and it was in that context that the $75 per unit offer was made.

THE COURT: Continue, please, Mr. Myers,

Q (By Mr. Myers, continuing) Professor Kayton, in the light of that context what, if any, consideration did you give to this $75 per unit offer?

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APPENDIX F

Max K. Murphy, Esq.

Page-2
June 20, 1967

In Genoa, I sought to interview Mr. Carl Richburg at the Genou Trailer Works, on Route 51 immediately outside Genoa, Ohio. He was no longer in the trailer business or residing in the area. His wife, whom I interviewed, did not enlighten me as to his whereabouts and indicated that she did not expect him to return for years. Since he has abandoned his business, it appears that he is maintaining a tight security against possible creditors and consequently would be difficult to locate even by friendly parties.

In the Youngstown-Warren area I attempted to *beard the patentee in his den* on the theory that the earliest use or sale would occur close to Girard, the patentee's home.

THE DART TRUCK NO. 20

The earliest embodiment of the turner suspension that I found was Truck No. 20 of the Dart Trucking Company of Canfield, Ohio. This truck, which was alleged to have been in a wreck, did not have a license plate. However it had Ohio Vehicle Tax for 1967, No. 2002. The manufacturer marking plate indicated that this truck was Model E332, Chassis 554077, produced by the Reo Division of the White Motor Company. The markings on the driver's side of the cab indicated the following information: ICC 121420; PUCO 7051-1; and CONT. 2054. The truck was a heavy duty dump truck having three rear axles. Two of these axles were permanently downwardly engaged with the road and carried double wheels. the third axle, which was carried forward of the other two, was a Turner suspension and carried single wheels. The frame of the truck was a double frame and the Turner suspension was welded underneath it.

I spoke with Mr. Frank Donato regarding this truck No. 20. He is an employee of the Dart Trucking Company. He said that he and Steve Turner, the patentee, in the early spring of 1964, put the Turner suspension on this truck. He further stated that it was the first truck having such a suspension in the valley". He further stated, and his employer, Mr. John Opritz, confirmed that Mr. Turner had previously, or two years, been making truck suspensions involving hydraulics rather than air bags.

Mr. Oprits, who is considered an hydraulics expert", indicated that he and one Mike Eaylisa, an employee of the Sigele Trucking Company of Northlima, Ohio, discussed truck suspension

June 20, 1967

The 1963 and earlier Turner suspensions appear to be hydraulic suspensions, not air bag suspensions. They might be useful in constructing an argument against validity of the Turner patent in the following manner. Under Muncie Gear Company versus Outboard Marine and Engineering Company, a 1962 U.S. Supreme Court case, a prior public use or sale occurring more than one year before actually being claimed in an application is sufficient under Section 102 to invalidate a patent. However the application of the Muncie Gear doctrine has been usually made by construing the specification as originally presented as being insufficient to support later claims. It is clear that Turner, in his original specification, has laid a sufficient basis to make claims limited to using air bags in his suspension. However, because his first four claims originally presented, and later cancelled from the case, are not restricted to the use of air bags or vertically extendable and retractable pneumatic motors", and that these claims were made more than one year after actual embodiments of suspensions using hydraulic members, the oath that Turner made with the original application was fraudulent. As far as I know, this argument is a novel one. However, it has been held that a false oath can invalidate a patent.

In my opinion, the lack of a bull's eye on a prior use or sale argument for invalidating the turner patent is not a sufficient reason to *cave in* to any demand patentee may make. As indicated in my memorandum of February 10, the claims in Turner have have been presented in such a way that a good argument is present for invalidity on the basis of anticipation, as well as a good argument for non-infringement. Furthermore, in the investigations that I made with respect to prior use, many people expressed

the view that with the earlier Turner air bag suspensions, where they were welded to a frame of a truck that was a reinforced frame rather than a double frame, the frames actually cracked under the load. Furthermore, it appears that Turner has not been successful in using his suspension for double Wheels. I think the reason for this is that the center or his rather large air bags are at a further distance from the center of wheels in double wheel configurations than in single wheel configurations, placing a greater bending moment on the axles.

CONCLUSION

The earliest public use was in early spring of 1964, *less than a year* before the filling of the Turner patent application.

APPENDIX G

May 5, 1967

Lawrence J. Winter, Esq.
815 - 15th Street, N.W.
Washington, D.C. 20005

Dear Mr. Winter:

Enclosed you will find copies of Turner patent No. 3,285,621 and Kulyk patent No. 3,093,388. Also enclosed is a copy of our catalog sheet showing our Model 1400 suspension. You will note that the claims of the Turner patent and claim 2 of the Kulyk patent maybe fairly read on the Model 1400. I have done some searching but have been unable to come up with an anticipation of the Turner patent or the Kulyk patent although I have the feeling that anticipatory art does exist.

Please make a search and pay particular attention to Class 105, Subclass 215. This sub and some affiliated subs have to do with combination railroad and highway vehicles, and it is very possible that somebody had the idea of providing a spring for lifting the railroad axle off the rails during highway travel and utilizing a hydraulic or air cylinder to engage it with the rails for rail travel. Look particularly at patents assigned to Evans Products Company and those, if any, in which Wright is the inventor.

Very truly yours,

M. K. Murphy
Patent Counsel

MKM:bj
enc.

APPENDIX H

TO

FROM H. E. CAREFOOT
M. K. Murphy

SUBJECT Model 1400 Air Suspension DATE Jan. 3, 1968

You will recall that we had a conversation in Mr. Thorsen's office a month or so ago, at which time it was decided that an attempt might be made to purchase the turner patent No. 3,285,621 through an intermediary.

I have investigated that possibility through an intermediary who is experienced in this sort of negotiation, and he reports that Mr. Turner indicated he was not interested right now in selling his patent. Apparently Mr. Turner has made some deal with a group who will attempt to grant licenses. Presumably we will be contacted by this group.

There does not seem to be anything we can do at the present time to resolve this question. If our salesmen discover anyone else who is manufacturing a similar type of axle and suspension, I would be interested in hearing about it.

MKM:bj
cc: J. B. Thorsen

—INTER-OFFICE—

APPENDIX I

PAGE 1400 SERIES AIR SUSPENSION

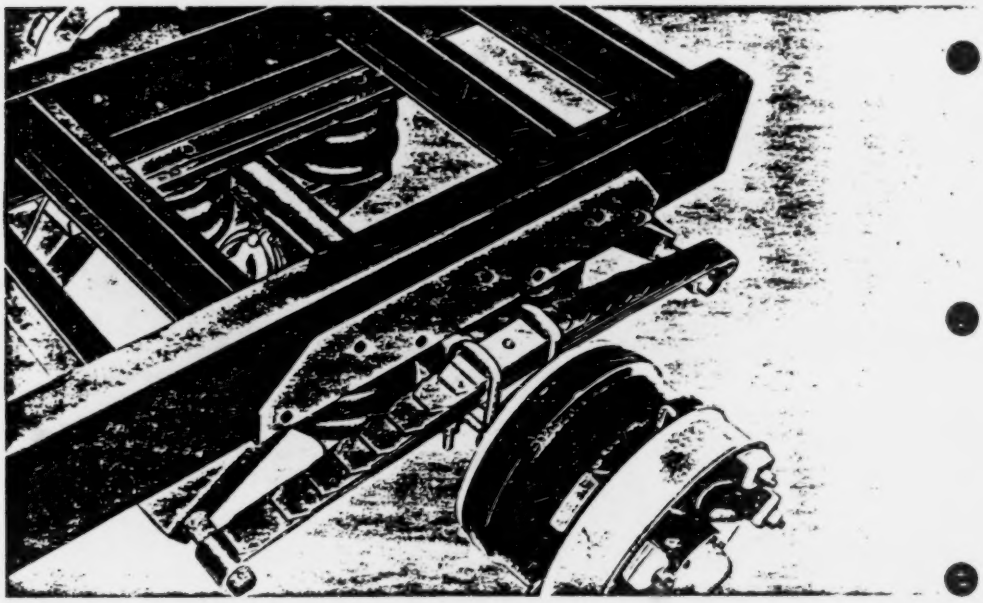


PXS-
6

PAGE 1400 AIR SUSPENSION

AUTOMATIC LIFT CUTS OPERATING COSTS

The springs on the Page 1400 Series Air Suspension *lift automatically* when the air is off. Works like Magic to cut operating costs . . . increase efficiency. But there's nothing magic in the way the Page 1400 saves you money.



MANY OTHER OUTSTANDING FEATURES:

UNIVERSAL APPLICATION
For tag, pusher, trailer, etc.

COMPETITIVELY PRICED
Lower than most competitive models

EASY TO INSTALL
Requires no special equipment

LIGHTWEIGHT
Permits bigger payloads and profits at no increase in equipment cost.

EASY INSTALLATION
Available complete with axles.

SMOOTH RIDING
Reduces driver fatigue . . . increases tire mileage

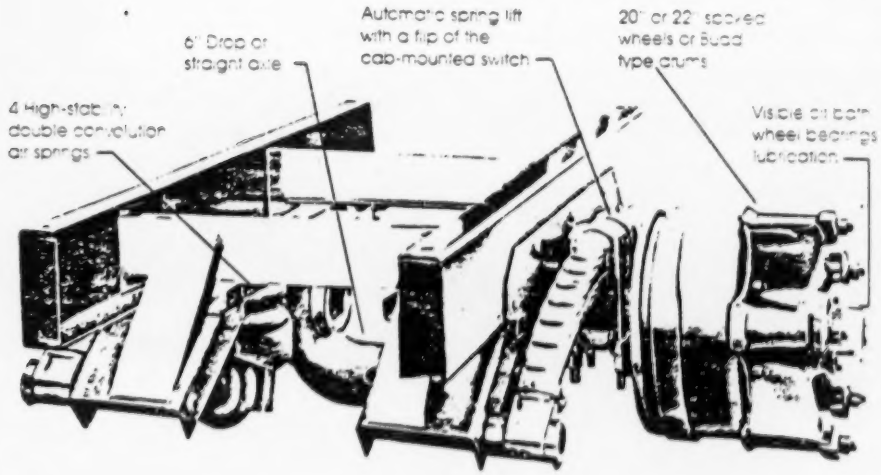
PAGE SUSPENSIONS

INDUSTRIAL PROD. DIV. · DURA CORP.
Subsidiary of WALTER KIDDE & CO., INC.
15 SPINNING WHEEL ROAD, HINSDALE, ILL. 60521

Kidde

PX5-
$7

Par-Lift
(1400)
Add-on lift suspension



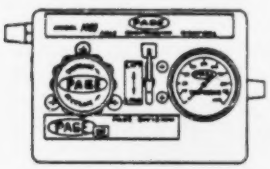
- Preassembled for fast mount
- Includes suspension, axle, brakes & wheels or drums

Fully tested and performance-proven. Engineered for long-life durability and low maintenance.

PAGE

P6-6
PX 5-8

Par-Lift (1400) Add-on lift suspension

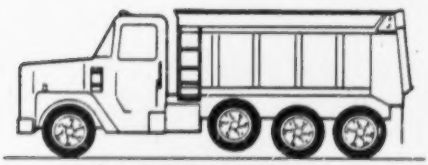


CAB-MOUNTED
AIR CONTROLS

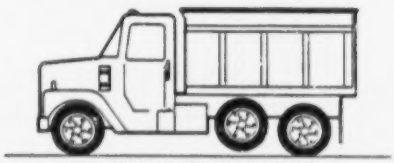
SPECIFICATIONS

1. Capacity—18,000 lbs.
2. Weight—suspension, drop axle, cam brakes, 20" spoked wheels complete—approx. 1425 lbs. (subtract 100 lbs. for straight axle)
3. Brakes—16-1/2" X 7" cam; 15" X 7" wedge Chambers—type 24
4. Track—71-1/2"
5. Frame Width—34-1/2" (can be shimmed to 33")
6. Pusher Axle Drop—6"
7. Space Requirements—38-1/2" at frame; 59-1/2" overall

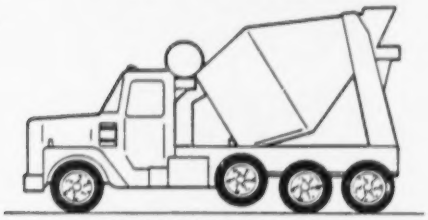
COMMON APPLICATIONS



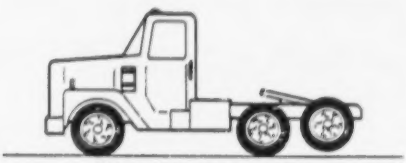
TRI-AXLE PUSHER ON 15' DUMP



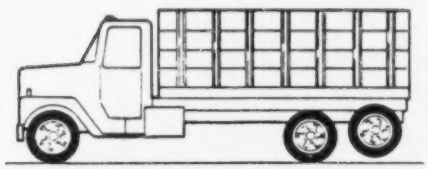
TANDEM PUSHER ON 12' DUMP



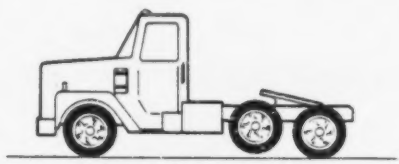
TRI-AXLE PUSHER ON MIXER



TANDEM TAG ON TRACTOR



TANDEM TAG ON GRAIN OR STAKE BODY



TANDEM PUSHER ON TRACTOR

Pg 7

PAR-LIFT DIVISION • DURA CORPORATION
FORDS MILL ROAD • PARIS, KENTUCKY 40361 • (606) 987-2240

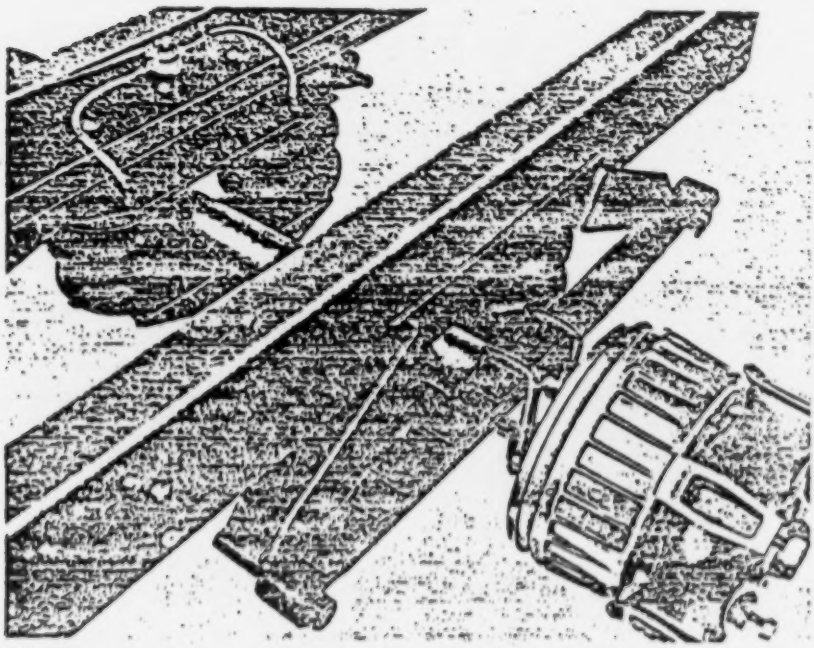
PX 5-9

FORM NO. 773-10M

MODEL 1400 PAGE AIR RIDE D-223

with

AUTOMATIC LIFT



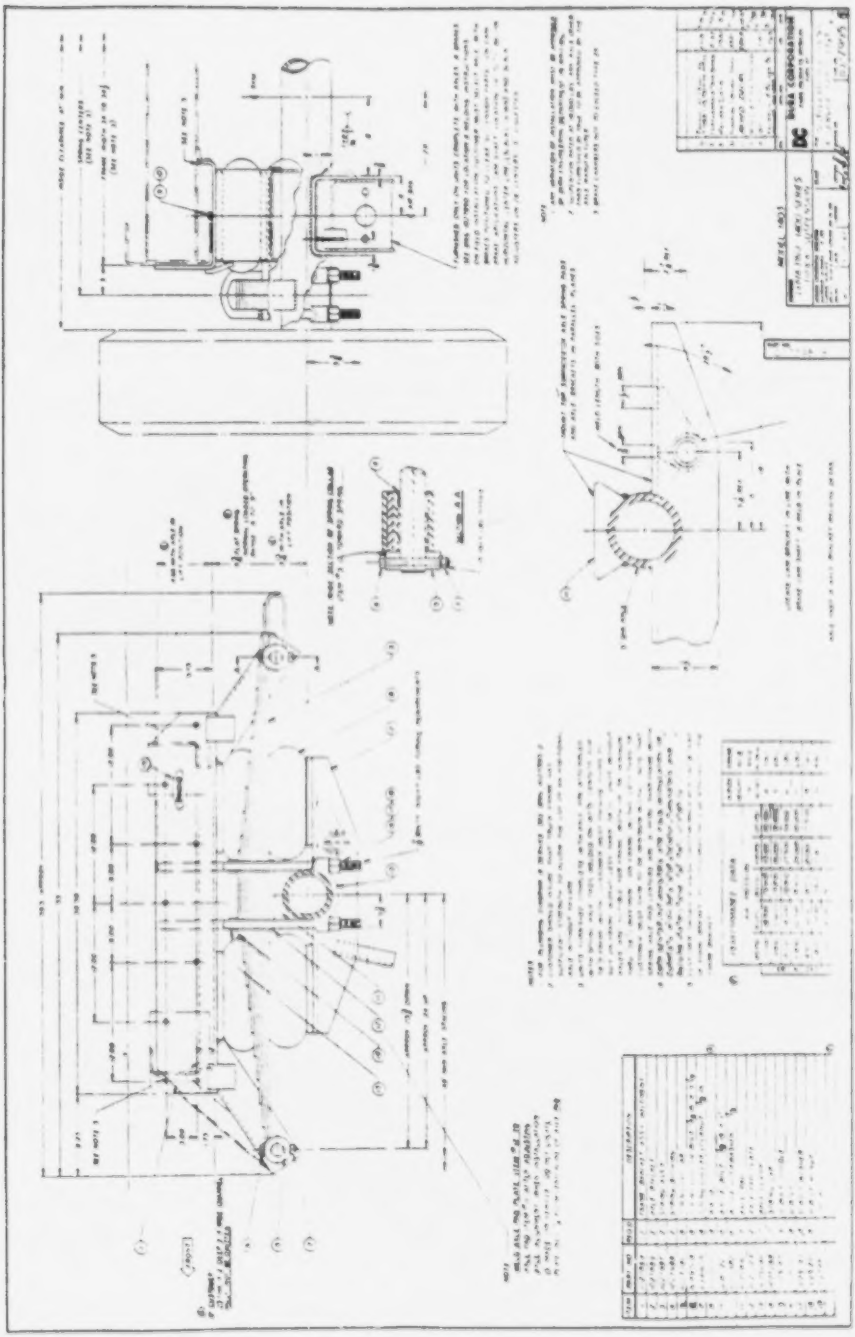
PAR

AIR SUSPENDED AXLE by PAGE®

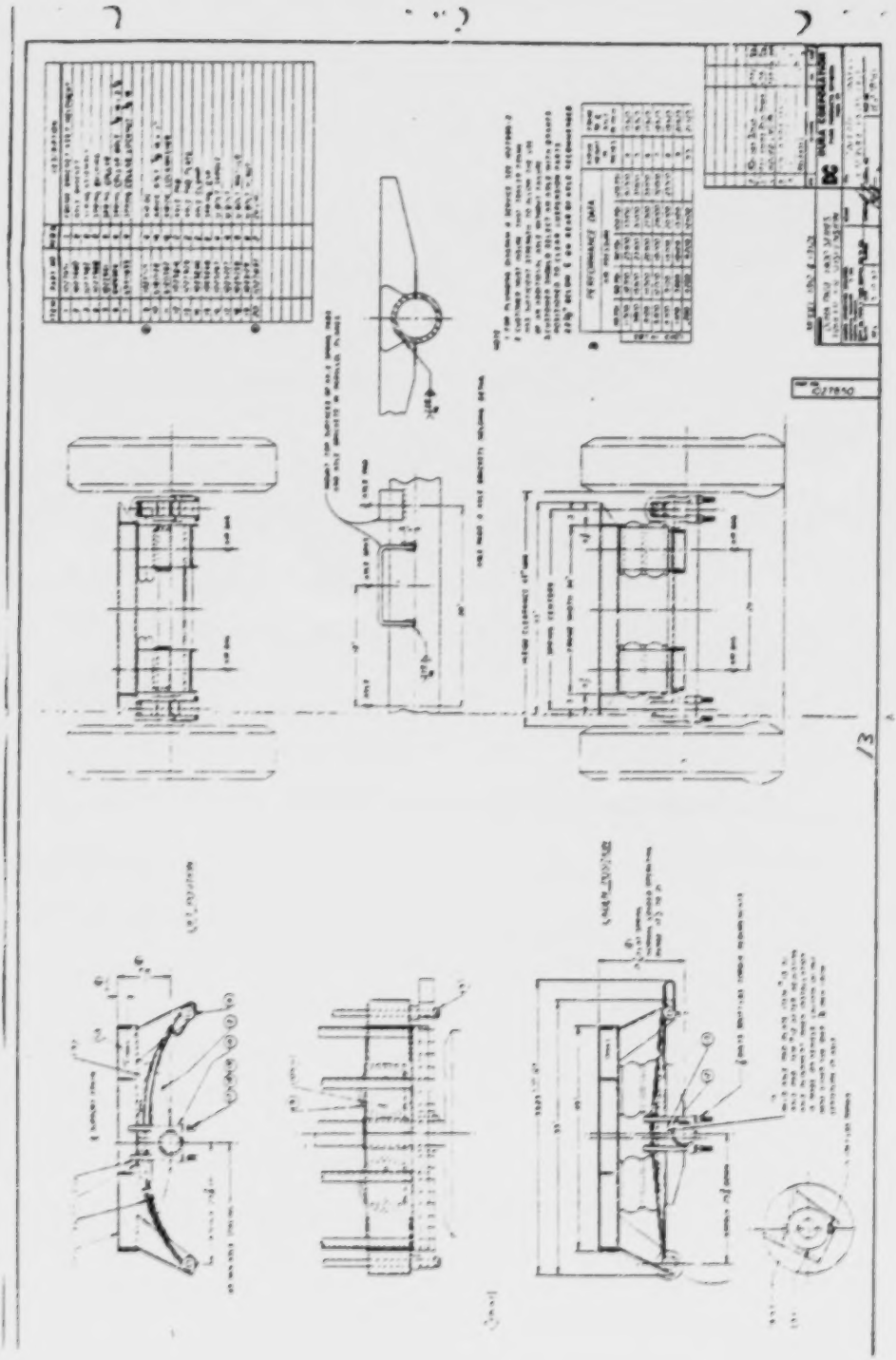
FEATURES

1. *AUTOMATIC LIFT*
   Spring lifts with air off
2. *UNIVERSAL APPLICATION*
   Tag, pusher or trailer applications, etc.
3. *COMPETITIVELY PRICED*
4. *EASE OF INSTALLATION*
5. *LIGHT WEIGHT*

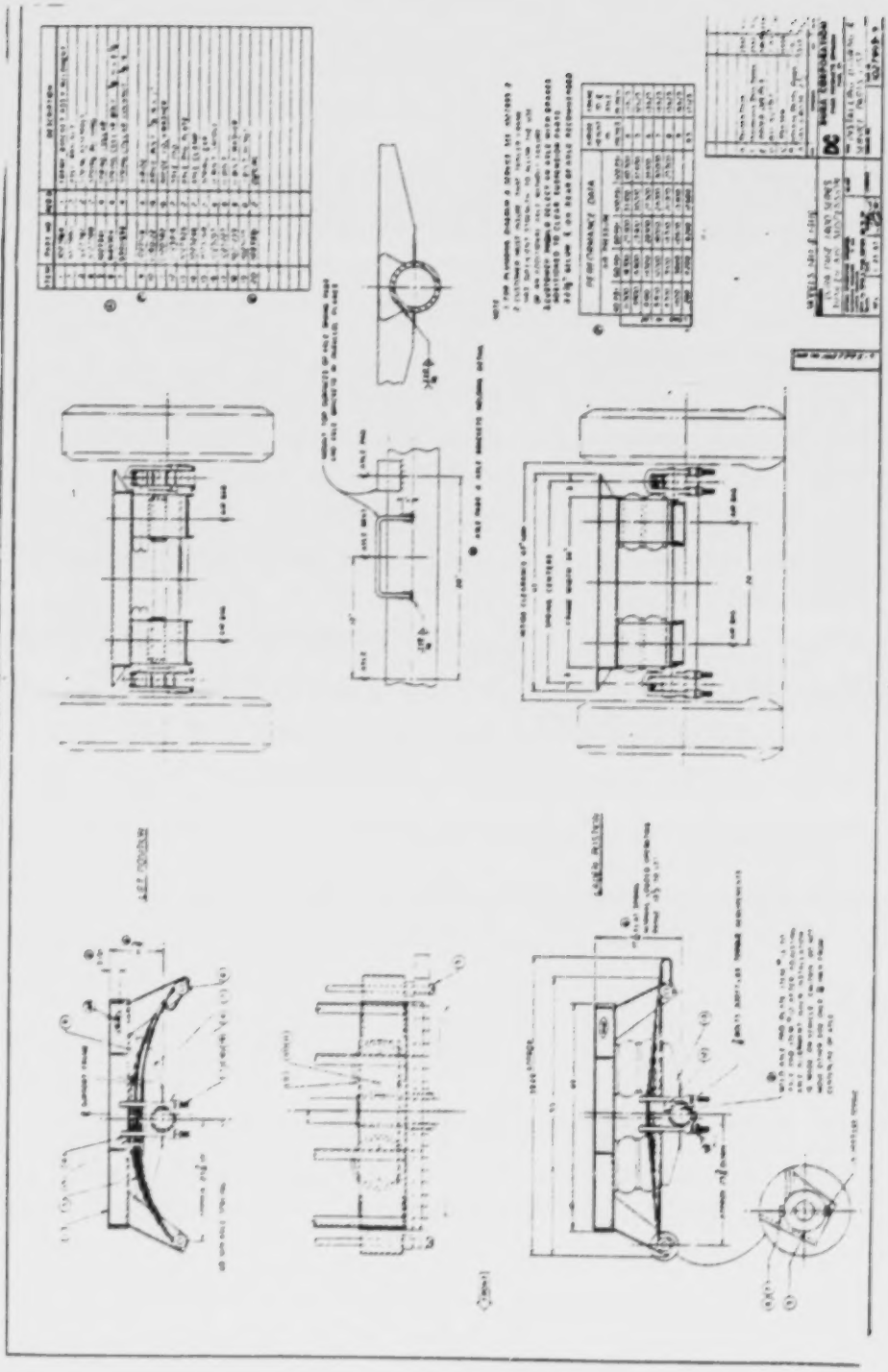
PAGE DIVISION · DURA CORPORATION
PARIS, KENTUCKY · DENVER, COLORADO · PORTLAND, OREGON



PXS-12



PXS-13



APPENDIX J

****

reports, that type.

Q How about Ed Handley, while you were working for him?

A That was correspondence with the whole division,

Q The whole division, you're talking about to the headquarters in Michigan?

A Well, there was some correspondence to Michigan. He was in charge of the whole division so any correspondence he had whether inner office or to outside companies I filed away, typed, just clerical duties.

Q Do you have any present recollection of where the sales records prior to June dealing with the 1400 sales prior to June 1, '73 would be located?

A No.

Q Did you help search for any such records?

A Yes.

Q And you couldn't find them?

A No.

Q At this point you're working for Ben Hill; is that correct?

A Right.

Q That's the president?

* * * * *

APPENDIX K

* * * *

Q What instruction did he give you?

A We were to go through the invoices and by part number, the 1400, pick out every sales order or invoice that is all attached together, and we had little sheets where we verified who it was sold to, the sales order number, the quantity, the part number, and the amount, and the date or the year.

Q So you went through those boxes in the back room sheet by sheet?

A Yes.

Q Now, it says on page five it says, Information requested in this interrogatory is available only for the period June 1973 to date." Now, do you know where the records prior to June '73 are?

A No, I don't.

Q Was it within a normal course of business for Dura to destroy documents after a certain age period?

A No, not really. We shifted and we had moved quite a bit so they could have gotten lost during the move. What was our record space is now our laboratory, so the lab people strictly were the people that moved the Stuff around.

Q Did you search for the documents prior to

A Correct.

Q Do you recall where that information was derived?

A Off hand, I don't know whether they came from the invoices or not. They could have come off of these records because it looks like they match.

Q By records, she's identify Fryman Exhibit Two.

A I'll just see if they match and they look like they match.

Q At the present time you don't recall?

A No, I don't. I know there was some years missing and some boxes missing. I know that, so as to which years or what, I don't know that, so as to which years or what, I don't know.

Q To step back, to the best of your knowledge you don't know of any sales summaries that were prepared other than the log sheets which have been marked as Exhibits Two through Fourteen?

A Correct, yes.

Q And you don't know whether any summary sheets were—or summary information was available from the computer?

A Right, I don't, no.

Q And to the best of your knowledge the people you've identified as Don Watson, Tom McCullough.

* * * * *

APPENDIX L

* * * * *

BOB L. PROBST,

having been first duly sworn, testified as follows, to-wit:

EXAMINATION,

BY: HON. GEOFFREY R. MYERS:

Q Would you state your name for the record, please.

A Robert E. Probst.

Q And your address?

A 6 Sweetbrush, Texarkana, Texas.

Q And who is your current employer?

A Texas Kenworth Company.

Q Are you represented here today by counsel?

A No.

Q Mr. Van Santen isn't representing you?

A No.

Q And I can say that I'm not representing you

A No.

Q Do you feel any need of counsel?

A No.

Q Mr. Probst, were you ever employed by Page & Page Company in Portland, Oregon?

A I was employed with them from 1956 until 1965.

Q Do you remember what month in '65 you left?

A I left in April, the 1st, 1965.

Q April 1, 1965?

A Right.

Q And when you left on April 1, 1965, what was your title? Do you remember?

A Sales Manager—or Domestic Export Sales Manager.

Q Where were you located?

A In Portland, Oregon.

Q Was that at Southwest Curry Street?

A Right.

Q Mr. Probst, I would like to show you three documents which I have marked—and I would like the Court Reporter to use my markings on them—the first document is P-1A, the second document is P-1, the third document is P-2, and the fourth document is P-3. Now, for the record, I would like to explain what P-1A and P-1 are. P-1 is our file copy of a letter which the attorney for Stephen Turner, Michael Williams, sent to Page & Page Company, Southwest Curry Street, Portland, Oregon, dated March 12, 1965, to the attention of the sales manager. The letter that would have been received by Page & Page company, to the best of our information, would have borne the letterhead of the firm of Williams and Kreske, and I have taken an old letterhead of Williams and Kreske that was the letterhead as of March 12, 1965, and I have appended it by staple to the top of document P-1, as document P-1A, such that if you hold P-1A as the letterhead of P-1, it would look more like the letter that the sales manager at Page & Page would have received. Document P-2 is the patent application of Stephen Turner, Jr., which was appended t the letter dated March 12, 1965,—P-1—and P-3 are the drawings that accompanied the Stephen Turner patent application. Mr. Probst, do you recognize these documents?

A Yes. These were received at our office at that time.

Q What did you do with these documents after you received them.?

A We were—we weren't the manufacturer of suspensions at that time. We had logging suspensions, trailer suspensions, but nothing to do with truck suspensions, and I called paris and Vanwinkle had transferred to Kenworth at that time, and due to the fact that Glenn Hileman was more or less filling in, I talked to Glenn about this and made a copy of these. We had these in our file in Portland, as well as sending the originals to Glenn Hileman, and I don't know what he did with them down there. He was handling the area that would have an airlift suspension, where we wouldn't have any use for it on the west coast.

Q Did you actually talk to Glenn Hileman about this?

A I called him on the phone, and I believe there was a cover letter went with it.

Q In those discussions, did you make any evaluation of the turner invention?

A Well, at the time I thought it would be a good idea; it was simple, a simple installation. As I said, I wasn't involved with this type of suspension, so I had no use for it there. We had a manufacturing and engineering department; however, it was mainly for trailers. It wasn't suspension.

Q Did you talk to anyone else about this?

A Not that I can remember.

Q And you distinctly remember, thought, that it was glenn Hileman?

A It was glenn Hileman that I talked to, because he and I more or less—he wasn't considered sales manager, but he was about the only one back there that really

knew anything about the suspension, and any problems I had would have been with he or Vanwinkle, previously.

Q Mr. Probst, I'd like to show you a document marked D-214. Have you ever had an occasion to see a Page Air Ride device, Model 1400, such as is illustrated in Document D-214?

A Let me say this. As I said, I started to work for Kenworth in '65, and up to about three years ago, I never came anywhere near this stuff. But at that time, I was assigned to the Product Department and we were looking for new products on the east coast to make a truck that would match the New York and that area. And I ran into this in Columbus, Ohio, on a couple of dump trucks, which I had never seen before, up to that time.

Q Did you have any thoughts about it when you saw it?

A Well, I mentioned at the time—I don't remember who I was with; one of the salesmen from one of the companies—that I had seen that previously on the west coast, but I had never even heard of it up to that time.

Q Did you relate that to the Turner patent application you received?

A Not at that time. I just knew that we had received something in regard to this, but I never knew—as I said, I had never seen it before that time.

Q Well, in your discussions with Glenn Hileman, did Mr. Hilerman ever make any statements in regard to the fact that he thought the turner idea was a good idea?

A No. Glenn and I—the only time I saw Glenn after I left Dura was in—I believe it was in Cincinnati or—one of our distributors was opening up there and straightaway, they will carry the axle down and then they will lift it on the tight turns to keep from scuffing. But it's for weight distribution, mainly. and a lot of the boys have

had these air lifts on them where they could control it, put air on it or carry it with some on or some off, whichever way they wanted to.

Q Where you familiar with lift suspensions for any length of time?

A Not at the time that these were sent to Paris. Mine had been all West Coast, practically all West Coast. However, I was familiar with the Kenworth air suspension because they had sold a lot of them.

Q Was that a lift suspension?

A No. It was f our-bag suspension.

Q At the time you received these documents then, P-1 through P-3, you had never heard of a lift suspension?

A I had heard of them, the Nu-way lift suspension. Nu-way had an air lift suspension which was a heavy suspension, and this is one of the things that I mentioned to Hileman on the telephone, about this suspension.

Q Was it similar to the Nu-way suspension?

A It was similar but it was lighter, a lot lighter. Nu-way had a heavy bracketing on its suspensions, and when I went to Page—rather, went to Kenworth, we were using a lot of the Nu-way on tank application, where they were running on tankers and if I remember right, we sent quite a few over to Australia with the air lift on it.

Q that was a lift suspension?

A It was a lift suspension.

Q You mean that the wheels were selectively engaged against the ground or lifted up into the air?

A Right.

Q How were these lifted?

A With air bags.

Q How were they depressed?

A With air.

Q Were you familiar at the time you received these documents, from Mr. Michael Williams, P-1 through P-3, with any spring lift suspensions?

A No, I wasn't.

Q You had never heard of any?

A I didn't have much contact, as I stated before, with any use for a third axle. And when I went to Kenworth, the third axle applications were all going to the East Coast.

Q I believe you testified on your direct examination that when you saw these documents, you thought it was a good idea.

A Right.

Q And I'm just trying to determine whether you thought it was a good idea because you had never seen a spring suspension in a lift before.

A The light weight is what got me. Now glenn and I and Vanwinkle had talked about—mentioned about this stuff in the East Coast, but I never had got involved with it whatsoever.

Q You weren't familiar—

A It looked simple; it looked simple, and that's why I was sending it on to them down there.

Q I see. Had you ever seen or heard of, in 1965 when you received these structures of lifting a suspension off the road with a spring?

A No, I hadn't.

Q That was a brand new idea to you?

A As far as I was concerned, it was, yes. I had been in trucking all my life.

Q and you didn't know that Nu-way had such a structure in 1965?

A I knew they had an air lift, but I never had seen one, other than—

MR. MYERS: I object to that question. It's a leading question and there is nothing established end and the shorter on the other end, which would give you your weight distribution to your axle.

Q In your experience, is the distributional weight ever allocated by selectively energizing an air bag?

A This is what I mentioned to you before, that I hadn't run into this until about three years ago, when I transferred to the Products Department with Kenworth, and we ran into it down on the East Coast, where the axle would be loaded or the axle would be relieved.

Q So it is common now, at least to your knowledge, from three years ago?

A Right.

Q Did Glenn Hileman ever answer to you in the corporate hierarchy?

A Do what?

Q Did he ever report to you?

A No.

Q So you worked independently of one another?

A Yes.

Q And who did you report to?

A Phil Corbet was the Manager and then we had a fellow out of Detroit who was—I really don't know what you

would call him. He was kind of over the division. I don't remember his name now, but he worked under Tom Smith.

Q I see.

A And he would get around about once a month or once every six weeks, eight weeks, something like that. However, I was basically responsible to Phil Corbet, who was the Manager of Page & Page at that time.

Q Have you ever met me until today?

A Not that I know of.

Q Have you ever talked with me or any member of my firm about your testimony here today?

A No.

Q Have you talked with anybody at Dura about your testimony today?

A No.

Q Have you ever talked with anybody representing the Plaintiff about your testimony today?

A I talked to you on the telephone in Washington, D. C. (Indicating Mr. Myers).

Q And by you, you made a gesture toward Mr. Myers?

A Right, Mr. Myers.

Q And when was that?

A About three weeks ago, I would say.

Q What was the substance of that conversation?

A He asked me if I had been with Page & Page Company and he wondered if I knew anything about a suspension an I told him that I had—he mentioned about the air lift suspension, and I believe I told him that I had run into it and had remembered previously receiving some-

thing on it, but names and so forth, this has been a long time ago; this has been since 1965, eight or nine years ago. But the only way that I really remember it is because the last part of my work there at Page, I was trying to clean up everything. And I'm certain I mentioned this to Phil Corbet—rather, I think Phil Corbet looked over these papers, and I had found that Vanwinkle—we had been notified that Vanwinkle had left and I was talking to Phil about who to send it to, and I told him I was going to send it to Hileman. You might check with Phil Corbet on this.

Q Is he with the company?

A He's in Florida somewhere.

Q He's not with Page & Page?

A No.

Q Is Page & Page still in the business?

A Not the division in Portland. Dura sold that out to—Page & Page is still in the suspension business, but out of Paris, or rather, out of the East Coast somewhere. They sold out the logging trailers and everything but the suspension to Peerless Trailer Company.

Q Did you ever report to Mr. Page?

A Yes, sir. that was before Dura bought us out and a little while after they were running it.

Q When did the change come between reporting to Mr. Page and reporting to Mr. Corbet, if you remember?

A Not long after—probably—it was probably six months, maybe longer—not much longer than that, afterwards. Page went out and—first, he kind of retired out of it and then was on a consultant deal for Dura Corporation. Phil corbet started—when Phil Corbet first came in there and I worked with him—we believed that he was supposed to have been Sales Manager; however, we

didn't know, and when Page was retired out or was—we don't know what happened there. That was a corporate deal as far as Mr. Page was concerned. However, after that time, Page was used a couple of times in Denver and it just didn't work out.

Q When you received this letter, P-1, did you send any reply to Michael Williams?

A No.

Q Did you ever receive any further communications with Mr. Williams?

A No.

BEST AVAILABLE COPY

APPENDIX M

TURNER QUICK-LIFT DIVISION
SOURCE OF INFORMATION OF UNITS AND SALES OF 1400 SERIES SUSPENSIONS SOLD BY DURA

EXHIBIT 'B'
Px.164

Year	1975 Interrogatory Amount	1981 Interrogatory Units	1981 Interrogatory Amount	Dura-Unit Sales Reports (Fryman Exhibit)	Analysis of Interrogatory Customer Sales		Computer Sales Report		Verdi Royalty Payments	Used In Damage Claim Units	Used In Damage Claim Amount
1967	$ -	1	$ 378	Not Available	Not Available		Not Available		812	812	$ 604,501
1968	-	12	9,300	Not Available	Not Available		Not Available		1,142	1,142	885,050
1969	1,400,000	1,406	1,127,682	1,406	Not Available		Not Available		1,537	1,537	1,400,000
1970	1,600,000	1,555	1,313,042	1,555	Not Available		Not Available		-	1,555	1,600,000
1971	1,500,000	1,510	1,280,264	1,510	Not Available		Not Available		-	1,510	1,500,000
1972	2,100,000	2,143	1,975,041	2,143	Not Available		Not Available		-	2,143	2,100,000
1973	2,400,000	(Seven Months) 1,187	1,039,970	2,378	(Seven Months) 1,157	$1,039,962	Not Available		-	2,378	2,400,000
1974	2,400,000	1,346	1,416,733	Through October 1,676	1,343	1,519,839	Not Available		(Annualized)	2,011	2,400,000
1975	-	646	808,987	Not Available	644	810,802	662	$ 853,535	-	662	853,535
1976	-	673	892,244	682	671	888,820	661	857,896	-	661	857,896
1977	-	837	1,242,219	~~871~~ ~~845~~	835	1,239,101	842	1,185,999	-	842	1,185,999
1978	-	1,351	2,056,966	1,359	1,351	2,056,312	1,353	2,071,021	-	1,353	2,071,021
1979	-	722	1,240,872	Not Available	758	1,224,959	813	1,204,074	-	813	1,304,074
1980	-	588	980,612	Not Available	588	980,611	696	1,183,133	-	696	1,183,133
1981	-	212	369,938	Not Available	213	369,389	327	514,680	-	327	514,680
TOTAL UNITS										18,442	
TOTAL SALES											$20,859,889

TURNER QUICK-LIFT DIVISION
NOTES: TO EXHIBIT 'B'
SOURCE OF INFORMATION OF UNITS AND SALES OF
1400 SERIES SUSPENSIONS SOLD BY DURA

1. For Years 1967 - 1968 - Information in Interrogatory" does not agree with units on which Verdi" royalty was paid (Pl Ex 'lb' Page 802-815—Liability Trail). Used units sold per Verdi" royalty reports.

   a)Average Selling Price arrived at as follows:

   All 1967 units shipped subsequent to February 23, 1967.

   (Pl Trial Exh. 8 Pg. 14—Liability Trail).

2. For Year 1969—Used units sold per Verdi" royalty reports. Used Sales amounts from 1975 Interrogatory No. 14-C (Pl Ex. 9, Liability Trail).

3. For 1970 - 1971 - 1972 - 1973, used units sold shown in Unit Sales Report of Dura (Fryman Exhibit)". The sales amounts used from 1975 Interrogatory No. 14-C (Pl Ex. 9, Liability Trail).

4. For 1974—The units shown in Dura's Sales Report (Fryman Exhibit) of 1,674 was for only 10 months. Annualized for 12 months amounted to 2,011. This was used in the Damage Claim". The sales amount used from 1975 Interrogatory No. 14-C (Pl Ex. 9, Liability Trail).

5. For 1975 to May 31, 1981 the units and sales amount shown in Dura's computer sales report was used.

* * * *

APPENDIX N

* * * * *

strikable. It goes to the weight.

Your Honor is going to decide prejudgment interest, but, if it helps the trier of fact to hear Professor Kayton testify on factors involved as he would have experienced them after litigation, that's perfectly permissible.

THE COURT: I do not take Professor Kayton's previously noted answer on the record as a conclusion of law, Mr. Waldbaum.

As to the weight to be given to his opinion that this is how willful infringement should be treated with regard to prejudgment interest. I will take it all into consideration in review of the final record.

Your objection is noted for the record.

Q (By Mr. Myers, continuing): Professor, have you heard the allegation made by the defendant that the reasonable royalty should be reduced here because of at least several non-infringing acceptable alternatives to the Turner invention?

A Yes, I have heard that.

Q Do you have an opinion totally independent of any technological analysis of your own or any of the other witnesses in this case, and using only recognized patent practices and procedures as to whether or not there existed during the critical period when a willing buyer and willing seller would have entered into an acceptable non-infringing alternative to the turner invention?

A Yes, I have such an opinion.

Q Would you give the Court your opinion, using only recognized procedures that do not involve technology of the other device?

A That's what I would do.
What I'm going to refer to now means that even if it could be argued that there are, from a technological point of view, substitutes; even if that could be argued, they must be ignored for the following six well recognized and established reasons. All of these reasons have to do directly and exclusively with Dura Corporation's activities.

The first reason why—now, each of these independently and alone demonstrate that there could not have been an acceptable non-infringing substitute. All six together establish, in my view, without question of a doubt, there could have been no acceptable non-infringing substitute.

The first independent factor is this. Sam Verdi and the Dura Corporation tried to develop and invent a competing lift axle suspension and did not succeed.

Q You're talking about the device that Mr. Smith was involved in?

A Yes, but that was the one that Mr. Smith testified to that he tried to help invent for the Dura Corporation. They failed and it was after that failure that the copying of Steve Turner's invention took place.

The question then immediately arises, if there was an acceptable non-infringing substitute, why didn't they copy one of those that wasn't patented? If they were so prevalent, why could they generate one on their own? If they were available, why copy the one that appears in a patent application which probably was going to issue as a patent but not necessarily.

The truth was if there were acceptable non-infringing substitutes, rational men would go to that rather than put their neck in the noose.

Number two, there was a notice of infringement during the critical period; I believe it was in December or early

January of '67. At about that time, Mr. Murphy, the in-house patent counsel of the Dura Corporation had the Turner Patent in his hand. He had been notified that the 1400 infringes and they were then in the process or had completed tooling up for the infringement, but the tooling-up costs were an unbelivably small amount, $3500. With only $3500 to lose for having tooled up, and with a patent which at that time he believed, based upon objective indicia of validity to be valid and infringed. Why did he continue to go on, instead of using an acceptable, non-infringing substitute, if it was available? That's what a rational person would do under those circumstances, but he didn't. He continued to go on with that.

Now, I note in my notes that what I've just told you about, Mr. Murphy's knowledge of the patent on January 9th, '67, and the subsequent continuation of preparation for manufacture of several units more appears in Plaintiffs' Exhibit 1-A at pages 297, 298 and 330.

Q Professor, would you take out Page 297 of Exhibit 1-B, please?

A Yes.

MR. MYERS: Your Honor, this has been introduced into evidence. It's a letter from Mr. Max Murphy, the inside patent counsel to Mr. David Maxim, the outside patent counsel of Dura Corporation. It's dated January 9, 1967.

Q (By Mr. Myers, continuing) Professor, is there anything in that document that you would rely upon, and if there is, I'd like you to read it to the Court, please.

A Yes, virtually the whole document, actually. It's very short.

He says, number one:

"It appears that the Verdi suspension—"the infringing device—

"—infringes the Turner Patent."
He says that's what it appears to him

Q Why don't you read that paragraph?

A "Enclosed is a photocopy of U.S. Patent No. 3,285,621 which issued November 15th, 1966."

That's the Turner Patent, Your Honor. "It appears that the Verdi suspension design may infringe this patent."

So, he believed it may infringe the patent. This was January 9th, '67 at the time that I made reference.

Moreover, the next paragraph indicates that he had no basis for believing the patent was invalid at that time. He said:

> "Please study this patent and if you feel that a question of infringement is raised, find out from Mr. Verdi whether he has any prior uses or other evidence which might invalidate the patent."

So, he is saying, "Look, I think it may infringe. If you think it infringes, then start to look for whether or not the patent is invalid."

MR. WALDBAUM: Objection, Your Honor. The document speaks for itself.

MR. MYERS: This is an expert opinion, Your Honor.

THE COURT: I think the document does speak for itself; however, I will allow the Professor to make his expert opinion and that's all the Court will take it as, M. Waldbaum.

Objection overruled.

THE WITNESS: And, so, that document represents, in my view, the basis for what I indicated before.

Q (By Mr. Myers, continuing) Let's take a look at page—excuse me, I didn't mean to cut you off.

A I was right in the middle. The basis of what I indicated before that with this kind of belief and no knowledge that the patent was invalid, why not go to an acceptable noninfringing substitute if there was one. Rational men, with a tooling cost of only $3500 expended, would do so.

Q Let's take a look at Page 298.

Your Honor, this is a document already introduced into evidence. It's a memorandum from Mr. Murphy, the attorney, to Mr. Carefoot, a division director, or the division director of their suspension division and it's dated January 9th, 1967. Copies of the document went to J. B. Thorsen, the vice-president, who has already been identified, and a Mr. J. Formsby. His name appears in other documents in the case.

Professor, is there anything in this document that you rely upon in addition to the letter from Mr. Murphy to Mr. Maxim?

A Yes, this document is dated exactly the same date as the preceding document that I just read from, January 9th, 1967. And, it's very short. He said:

> "I made a preliminary study of this patent which appears to raise a serious infringement question."

Well, if there was a serious infringement question and there are acceptable non-infringing substitutes, why not go to an acceptable non-infringing substitute? The answer to all of those questions always necessarily is there could not have been an acceptable non-infringing substitute because, otherwise, that's what a reasonable person would have gone to.

Q How about the next sentence? Does that have any bearing on this situation?

A Yes. I'm sorry, I overlooked it because it goes lock-step with the preceding letter:

> "A validity investigation of the patent will be instituted and I will advise you further after that has been completed."

Now, that is a vital statement. At this point he had no knowledge, this patent attorney had no knowledge the turner Patent was invalid, none whatsoever, as those documents show. He was going to investigate and, yet, they continued tooling up and they shipped infringing equipment within a month or month and a half after this letter.

Q Let's take a look at Page 303.

Your Honor, this is a document dated two days later, already into evidence. It's a memorandum which, over on Page 304, is signed by Mr. Carefoot, the same Mr. Carefoot that received this document from Mr. Max Murphy stating that there was a serious question of infringement.

Professor, is there anything in this memorandum, two days later, on January 11, 1967, which supports what you have said; namely, that they proceeded to sell and tool up and continued to go with the 1400 suspension even though their in-house patent counsel had told them there was a serious question of infringement and had stated he had not yet been able to invalidate the patent?

A Yes, right in the middle of the first page, there is a section that deals with Model 1400 and, under that subheading, the third paragraph says:

"The present unit—" that is the Model 1400—

"—that they're building is considered

satisfactory to authorize the procurement of material for 300 more units."

This is January 11th, 1967, two days after the patent attorney said, number one, there is a serious infringement problem and, two, I have not investigated validity.

Q What, if any, effect does that have, does that opinion have that there were no acceptable non-infringing alternatives during the critical period?

A Well, independently, totally by itself, it's a demonstration that there could not have been an acceptable non-infringing substitute.

Q As far as the mind of the willing buyer and willing seller; namely, Dura and Turner are concerned?

A Exactly. That, I assume that that is the context in which we're talking about. If I have been remiss in not making that clear, that is the case.

Q Now, are there any other non-technological indicia that you have relied upon in reaching your opinion?

A Yes, and, really, the third one is they did willfully infringe. They did, in fact, in February and early March, despite all of this, actually sell.

The last document on Page 303 demonstrates that that was the case. Why would anyone do that if there is an acceptable non-infringing substitute?

The fourth totally independent factor, based upon Dura Corporation's —

Q Professor, before you go on to that, I'd like to ask you another question. Please turn, if you would, in your Exhibit 1-A, to Page 442.

A 442?

Q Yes. You made the statement, and I believe I heard correctly, that they did go on and they did willfully

infringe, and that was a reason why, another reason why there were no acceptable non-infringing alternatives.

I direct your attention to this letter from Mr. Murphy to an outside attorney in Washington, D.C., a searcher for the law—

A I must have the wrong document.

Q (By Mr. Myers, continuing) Pardon me, and, for the record, it's 422.

A In fact, I don't remember seeing 442.

Q I misspoke and I apologize to the Court.

A Okay, yes.

Q This is a letter dated May 5, 1967. Is that after the critical period.?

A Yes, it is.

Q And that's after the April 24, 1967 discussions with Mr. Gerald Kreske, isn't it?

A Yes.

Q Is there anything in this letter that would help the Court understand or serve as a basis for your opinion that they continued and did, in fact, willfully infringe?

A Yes, in the first paragraph, he says that the claims of the Turner Patent may be fairly read on the Model 1400. That means it's fair to say that there is an infringement.

He continues on and says:

"I have done some searching but have been unable to come up with any anticipation of the Turner Patent or the Kulick Patent—" which was another patent that they were considering—

"—although I have the feeling that anticipatory art does exist."

So, he says his independent evaluation as late as May 5th, 1967, long after the willful infringement started, he still hadn't been able to find anything that, in his opinion, rendered the turner Patent invalid.

Q Did you testify on this whole area at the liability trial?

A Yes, I did. I testified on all of these things at the liability trial.

Q Now let's go to the other indicia that you believe support your opinion that there were no acceptable non-infringing alternatives in the lines of Dura and Turner during the critical period at the time that the willing buyer and willing seller would have entered into a license agreement.

A Yes. The fourth item is that long after willful infringement started, based on the testimony that I have heard, dura Corporation tried to introduce three other lift axle suspensions that would get it into the lift axle suspension business or activity not using the 1400. Now, I believe that has been testified to by Mr. Vandenberg and in part by the then President of Dura Corporation or chief engineer during the liability trial.

Q William Lock?

A William Lock, that's his name.

they tried to do that, but they were all commercial failures. Therefore, that being the case, we have a demonstration that they were looking for an acceptable non-infringing substitute. They tried to design one. They came out with a product, and they failed to be acceptable non-infringing substitutes.

Q Any other indicia?

* * * * *